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REVIEWS

*Active Liberty:
Interpreting Our Democratic Constitution*

BY STEPHEN BREYER

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REVIEWS

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PAUL GEWIRTZ

The Pragmatic Passion of Stephen Breyer

Now in his twelfth year as a Supreme Court Justice, Stephen Breyer has written an important book, *Active Liberty*,¹ which crystallizes a fundamental set of beliefs about the American Constitution and his role as a Justice. Taking *Active Liberty* as the entry point, this piece places Breyer's book in the wider context of his judicial opinions and activities as a Justice—and, as such, seeks to provide a preliminary sketch of Breyer's distinctive place in American law today.

I. VOICE

Active Liberty emphasizes one theme that Breyer says runs through our primal document and that should help guide how we determine its meaning in a wide variety of cases: the idea of democratic participation. Breyer argues that our Constitution embodies not only a commitment to “negative liberty” (protecting citizens from government interference with their lives) but also a commitment to “active liberty”—creating and fostering a form of democratic government in which the people “share the government's authority” and actively “participat[e] in the creation of public policy.”² Viewing the Constitution in this way, Breyer argues, will lead to better constitutional interpretations and a more “workable democratic government.”³

To understand *Active Liberty*—and the Justice who penned it—we must first understand what it is not. It would be a mistake to see this book—as some of its critics have—as offering a “theory” about the Constitution. Breyer explicitly disclaims that he is setting forth a “theory.”⁴ Although a longtime

1. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

2. *Id.* at 33.

3. *Id.* at 34.

4. *Id.* at 7, 110.

professor at Harvard Law School before becoming a judge on the United States Court of Appeals in 1980 (he was an administrative law scholar whose writings focused on the practice of economic regulation), Breyer is not by temperament a theorist—certainly not in the sense currently fashionable in the legal academic world. And his judicial opinions since becoming a judge have not seemed to be shaped by general theories.

Instead, his book is best seen as an activity of induction. Here Breyer is open about what the book represents: At a certain point in his judicial career, after deciding an enormous number of individual cases and writing a large number of opinions that explain conclusions in terms of legal doctrine and practical policy, he has looked for a “pattern” in his own work.⁵ The theme of democratic participation, then, is not only what he has found in his study of the framing of our Constitution and in American history, but also a thematic pattern that he sees in his own judicial decisions. This is something, one senses, that he had not seen until recently as such a significant and unifying thread in his own prior work. He is not providing a roadmap for deciding future cases. Breyer describes his ideas as “themes,” an “approach,” an “attitude,” not a “theory,” and emphasizes that they can “help” decide close cases, rather than dictate results without regard to other interpretative tools.⁶

Nor is this book a comprehensive statement of Breyer’s views of the law or a full portrait of Breyer the Justice. Certainly the book’s substantive theme of democratic participation, however strongly Breyer emphasizes it, is only one of his substantive preoccupations as a constitutional judge—themes and values that include, one must add, a certain distrust of populist democracy and a faith in elite expertise.⁷ The part of *Active Liberty* that may capture Breyer’s behavior as a judge more fully is the book’s other main theme, which is methodological: Judging is a pragmatic and purposeful activity in which interpretation and decision must always be attentive to the purposes of legal provisions, the multiplicity of factors involved in specific cases, and the practical consequences of judicial decisions, and should not focus exclusively on textual exegesis and uncovering original understandings.

5. *Id.* at 110–11; Linda Greenhouse, *Court Veteran Remembers a Scary Start*, N.Y. TIMES, Feb. 16, 2006, at A31 (quoting Breyer as saying that “[w]riting the book, the doing of it, forced me to work through and find the coherence” in his opinions).

6. BREYER, *supra* note 1, at 6, 7, 9, 11, 12, 18–19, 34, 50, 53, 56, 110–11.

7. *Active Liberty* is particularly interesting to read alongside a book that Breyer wrote as a U.S. Court of Appeals judge shortly before his appointment to the Supreme Court, which emphasizes the importance of administrative expertise as a way to resist populist pressures to overregulate risk. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); *See also* BREYER, *supra* note 1, at 86, 102–03, 105 (recognizing some tension between democracy and administrative decisionmaking).

To understand the book and Justice Breyer more fully, the book is best read alongside Breyer's judicial decisions. The true virtuoso in Stephen Breyer is expressed through recurring decisions in specific cases, explained through unusually compact, complex, transparent, practical, and balanced explanations in hundreds of opinions. Breyer's decisions not only address a wider set of substantive themes than the book, but his decisions also capture the particularity of Breyer's approaches to concrete cases and specific legal issues. His opinions never rest on unitary principles, including "active liberty," but invariably draw on multiple sources of meaning. He is not a case-at-a-time judge, but he is always engaged in the detailed particularity of specific cases, and in many ways his distinctive excellence is that he sees that particularity so clearly and can hold in place and attempt to balance the many factors that he sees at stake at particular moments of decision. These are the qualities that lead some to view him at times as too subjective or too cautious; for me and many others, however, they are the qualities that make Breyer an exceptional Justice—a consummate pragmatic judge. His book is an important work of self-reflection, made especially valuable because it gives us a glimpse into the general thinking of a judge who lives each day in the fray, with responsibilities and preoccupations very different from a scholar's. But we should not privilege this book over the day-to-day work of Stephen Breyer the Justice, any more than we might privilege a poet's reflections on poetry over the poems themselves.

The book is a manifesto of sorts, a sustained expression of his personal approach to constitutional interpretation, and a respectful criticism of the current Supreme Court for having "swung back too far" in the wrong direction by "too often underemphasizing or overlooking the contemporary importance of active liberty."⁸ Moreover, Breyer's most interesting and important contributions as a Justice have largely been in separate opinions—expressions of a distinctive individual voice, not the views of a Court majority.

Given this, we should recall how Breyer was perceived and described when President Clinton nominated him to the Court in 1994. He was perceived, correctly I think, as a consensus-builder.⁹ He was described as a moderate-liberal Democrat: As a top staff member of the U.S. Senate's Judiciary Committee, he had worked very effectively across party lines to find common

8. *Id.* at 11.

9. Remarks Announcing the Nomination of Stephen G. Breyer To Be a Supreme Court Associate Justice and an Exchange With Reporters, 1 PUB. PAPERS 909 (May 13, 1994) ("He has proven that he can build an effective consensus and get people of diverse views to work together for justice's sake."); Paul Gewirtz, Op-Ed., *Who Is Stephen Breyer?*, HARTFORD COURANT, July 24, 1994, at D1 (highlighting Breyer's "vaunted ability to build consensus.").

ground (indeed, this explained why his nomination to the U.S. Court of Appeals for the First Circuit was approved by the Republican-led Senate even after President Carter had lost the election to Ronald Reagan¹⁰). As a Court of Appeals judge, he had found grounds for decision that typically produced unanimous opinions on his court. At the time of his nomination to the Court, some perceived him as too much of a “technocrat”—holding against him his background in administrative law and regulatory policy, as if those fields were inconsistent with compassion—and some perceived him as insufficiently ardent about social causes.¹¹ But the dominant view was that he was a pragmatic moderately liberal judge, and a person who had a good chance of helping a fractured Supreme Court find consensus and common ground in decisions.¹²

To a large extent, this prospect of consensus-building has proven illusory. Justice Breyer’s colleagues on the Supreme Court, it has turned out, are not especially committed to finding consensus. They are strong individuals who have views that they wish to express. Most significantly, this is an era of conservative ascendancy. To the extent that there are blocs on the Court, Breyer is part of a minority bloc. At times he crosses over (more on this below), but on many of the most contested issues at the Court he is part of the dissenting group of more liberal Justices. Yet Breyer, by temperament, is not the dissenting type. He likes to solve problems, find areas of agreement, and cooperate with others. During an interview at the Brookings Institution, he recently suggested that in his third grade class students were graded based on their ability to get along with others—“participating and cooperating” was what he called it.¹³ Breyer emphasized that these are good traits to develop among citizens in a democracy; but “participating and cooperating” is also his own style as a person, and undoubtedly his preferred style as a judge.¹⁴ He found at least one colleague who substantially shared his temperament and also

10. John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 492-93 (1997).

11. See, e.g., *Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 369 (1994) (statement of Sen. Howell Heflin, Member, S. Comm. on the Judiciary) (stating to Breyer that “the word ‘technocrat’ has been frequently used in descriptions about you” and “that technical approach has sometimes been criticized”).

12. See, e.g., Gewirtz, *supra* note 9.

13. Stephen Breyer, Remarks at the Brookings Institution 51 (Oct. 17, 2005), available at <http://www.brookings.edu/comm/events/20051017Breyer.pdf>.

14. In this respect, he also emphasized “the importance for everyone of getting on with people you disagree with.” *Id.* at 45. He also cites de Tocqueville as noting that the reason American democracy works is because people here “learn how to work together.” *Id.* at 51-52.

his instinct for moderation—Sandra Day O'Connor—and their collegueship would itself be an interesting subject for future scholarly study. But because their political starting points were frequently different, and because her more centrist position on the Court allowed her a somewhat wider field for coalition building, Breyer and O'Connor never emerged as a consistent partnership on the Court.

Although Breyer has never flagged in his optimism that consensus is possible in most cases,¹⁵ he has not become a great consensus builder on the Court. Instead, he has emerged as an individual voice, and often in dissent or in concurring opinions.¹⁶ He has certainly adjusted to his role, but it cannot have been how he expected it would turn out. His book, *Active Liberty*, reflects a continuation of this development of an individual voice and perspective, and provides an additional path for spreading the influence of his ideas.

II. IDEAS

Breyer's commitment to active liberty has two different implications for his view of how constitutional cases should be decided. In different situations, it can lead either to judicial deference to the democratic process, or to judicial invalidation of legislation that limits democratic participation. We see various aspects of this two-sidedness both in the examples that Breyer discusses in *Active Liberty* and in his opinions as a Justice.

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15. It is revealing that in his book, as well as in public appearances, Breyer repeatedly underscores that the Justices reach broad agreement in most cases and also that in the Court's conference room he has "never heard one member of the Court say anything demeaning about any other member of the Court, not even as a joke." Breyer, *supra* note 13, at 44; see also BREYER, *supra* note 1, at 110.
 16. This is not to slight the many cases in which Breyer speaks for the Court in majority opinions. Many are of large significance. See e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (concerning abortion rights); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (deportation of aliens). Some reveal a remarkable snatching of partial victory from defeat. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (Breyer, J., dissenting in part). And in many more ordinary cases, by Supreme Court standards, Breyer demonstrates an easy command of the multiple tools of legal interpretation to reach sensible results and bring majorities along. See, e.g., *Small v. United States*, 125 S. Ct. 1752 (2005) (construing a firearm statute). Moreover, we do not know the consensus-building role of Justices who silently join majority opinions, even though they may have been instrumental in producing the majority. Interestingly, according to the *Harvard Law Review's* statistics for the 2004 Term, Justice Breyer was tied with Justice O'Connor as the Justice most frequently in the majority in cases in which the Court was not unanimous, suggesting the possibility that he has been developing a larger consensus-building role. See *The Supreme Court 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 423 tbl.I(D) (2005).

First, Breyer's theme that "courts should take greater account of the Constitution's democratic nature" leads him to be a strong advocate and practitioner of "judicial modesty"¹⁷—the courts' deference to the decisions of other more democratic branches of our government, branches that tend to involve fuller democratic participation by citizens. In a recent study of the decisions of the Supreme Court between 1994 and 2005, Chad Golder and I have shown that Breyer has voted to overturn provisions of congressional statutes the least number of times of any of the Justices—a showing that surprised those who had associated "judicial activism" with the Court's more liberal wing, of which Breyer is usually a part. (Indeed, according to the study, "conservative" Justices voted to overturn congressional provisions the most frequently.)¹⁸

Second, in certain contexts, Breyer's theme leads him to justify a more active role for courts in giving concrete life to the Constitution's "democratic nature"—by striking down decisions of other branches of government that limit democratic participation. The early pages of *Active Liberty* suggest that Breyer is more interested in the second, more activist implication of his theme than the first.¹⁹ But in fact most of his major examples in the "Applications" section highlight his deference to the choices made by other institutions (for example, deference to Congress on campaign finance legislation, deference to Congress on Commerce Clause and related federalism questions, deference to the University of Michigan Law School on affirmative action).²⁰ There are certainly many situations in which Breyer has voted to strike down the acts of other institutions as unconstitutional—for example, the death penalty for juveniles²¹ and mentally retarded persons,²² school voucher programs that involve religious schools,²³ restrictions on abortion,²⁴ laws punishing homosexual conduct,²⁵ some antiterrorism detention measures,²⁶ California's

17. BREYER, *supra* note 1, at 5.

18. Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A23.

19. See BREYER, *supra* note 1, at 5–6.

20. *Id.* at 49, 60–65, 79–84.

21. See *Roper v. Simmons*, 543 U.S. 551 (2005).

22. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

23. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 717–29 (2002) (Breyer, J., dissenting).

24. See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Breyer, J.).

25. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

26. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

“three strikes” law,²⁷ certain restrictions on political speech²⁸ and sexually explicit speech,²⁹ and copyright protections lasting an extremely long period of time.³⁰ But his work as a judge, like his book, shows him to be a liberal who gives genuine deference to other branches of government.

The single most important area of Breyer’s work on the Court has been his opinions on the First Amendment, in which he has developed a unique and pathbreaking approach to issues of freedom of speech. Indeed, in my judgment, Breyer’s are the most important new ideas about the First Amendment on the Supreme Court since Justices Brennan and Black. The entire active liberty theme in the book seems to have developed out of insights and approaches that Breyer first developed in concurring and dissenting opinions in free speech cases during his first years on the Court. Justice Breyer’s core idea is that the First Amendment’s role is not simply to protect individuals from direct government restraints on speech. The First Amendment’s freedom of speech seeks not only to protect a negative liberty, but also to promote active liberty by encouraging the exchange of ideas, public participation, and open discussion. In other words, the purpose of protecting the freedom of speech in the First Amendment is to promote a system of free expression that provides speakers wide opportunities for public and private expression, provides listeners diverse sources of information, fosters greater democratic participation, and creates greater public confidence in the democratic process.

This has various implications. For one thing, it leads Justice Breyer to argue that in many First Amendment cases the particular restriction on speech is not the only free speech interest involved. Rather, the restrictions on speech in the challenged laws may actually enhance the speech of some, even though they limit the speech of others. Constitutionally protected interests “lie on both sides of the constitutional equation.”³¹ In such cases, Breyer argues, it is

27. See *Ewing v. California*, 538 U.S. 11, 35-62 (2003) (Breyer, J., dissenting); see also *Lockyer v. Andrade*, 538 U.S. 63, 77-83 (2003) (Breyer, J., dissenting).

28. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 665-86 (2003) (Breyer, J., dissenting from the dismissal of the writ of certiorari as improvidently granted).

29. See *Reno v. ACLU*, 521 U.S. 844 (1997). But see *Ashcroft v. ACLU*, 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting) (finding the Child Online Protection Act constitutional).

30. See *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting).

31. BREYER, *supra* note 2, at 48; see also *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) (“[T]he question before us . . . implicates competing constitutional concerns.”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[C]onstitutionally protected interests lie on both sides of the legal equation.”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226 (1997) (Breyer, J., concurring in part) (“[T]here are important First Amendment interests on the other side as well.”).

inappropriate to assess a restriction on speech using strict scrutiny. Rather, the right question is whether the laws “impose restrictions on speech that are disproportionate when measured against their . . . speech-related benefits.”³² Questions can be raised about whether this recalibrated balance is appropriate and whether courts can be trusted to implement it—as I have discussed elsewhere³³—but none of these undermine the importance of Breyer’s insights and his challenge to the Court’s current approach to First Amendment issues.

In a variety of separate opinions, Justice Breyer has used his new approach to the First Amendment to reach conclusions that differ from his colleagues. Most importantly, at a time when campaign finance laws were still under the heavy cloud created by *Buckley v. Valeo*,³⁴ Breyer wrote a concurrence in *Shrink v. Missouri* that showed greater tolerance for laws limiting campaign contributions and spending so as to “democratize the influence that money . . . may bring to bear upon the electoral process,” and “to “encourag[e] the public participation and open discussion that the First Amendment itself presupposes.”³⁵ Here, Breyer foreshadowed the Court’s later decision—if not the precise reasoning—in *McConnell v. FEC*,³⁶ upholding the main provisions of the “McCain-Feingold” federal campaign law of 2002.³⁷

Active Liberty gives particular attention to the issue of campaign finance, and also to Breyer’s view that courts should distinguish political speech from commercial speech and allow greater regulation of the latter. Breyer has used his approach to resolve cases differently from the Court majority in a variety of other contexts as well, which show more fully the far-reaching implications of his distinctive ideas. For example, he would allow Congress greater leeway to require opening cable TV to more diverse voices in order to promote the democratic objective of “assuring that the public has access to a multiplicity of information sources,” even though the speech interests of the cable owners are somewhat restricted.³⁸ He has indicated a greater willingness to uphold legislation that restricts the media in order to promote privacy, in part because protecting privacy of communications itself encourages people to speak more

32. BREYER, *supra* note 1, at 49.

33. Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 193-98.

34. 424 U.S. 1 (1976).

35. 528 U.S. at 401 (2000) (Breyer, J., concurring) (internal quotation marks omitted).

36. 540 U.S. 93 (2003).

37. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

38. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (quoting *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

freely and thus promotes a more vibrant system of free expression.³⁹ Justice Breyer has also been more receptive than the Court majority to upholding restrictions on speech when there is an important competing value that is not itself a speech value. For example, he wrote a dissenting opinion stating that he would uphold a restriction on the programming leeway of cable operators when the value on the other side was protecting children from indecent programming.⁴⁰

A second area where Breyer has made major contributions as a Justice is federalism. Limiting national powers in federalism cases was one of the hallmarks of the Rehnquist Court, and Breyer has been a leading dissenter in this area and he gives it distinctive attention in his book.⁴¹ In cases such as *United States v. Lopez*, in which the Court has struck down congressional enactments as exceeding Congress's Commerce Clause powers, Breyer has emphasized the importance of deferring to Congress because of its plausible conclusions and comparative advantage in assessing social facts (the empirical detail of his dissent shows him writing in the tradition of Justice Brandeis⁴²), and because "the public has participated in the legislative process at the national level" (invoking the active liberty theme).⁴³ His book gives somewhat greater attention to federalism decisions striking down congressional legislation because it "commandeers" state officials⁴⁴ or violates the Eleventh

39. See BREYER, *supra* note 1, at 71-73 (discussing *Bartnicki v. Vopper*, 532 U.S. 514 (2001)).

40. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting). That said, there are also situations involving what he considers core political speech when Breyer might impose stricter limitations on speech regulation than his colleagues. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 665-86 (2003) (Breyer, J., dissenting from the dismissal of the writ of certiorari as improvidently granted).

41. BREYER, *supra* note 1, at 56-65.

42. For Breyer's interesting and perhaps self-reflective discussion of Justice Brandeis, see Stephen Breyer, Justice Brandeis as Legal Seer, Brandeis Lecture at the University of Louisville School of Law (Feb. 16, 2004), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-16-04.html.

43. 514 U.S. 549 (1995); see also *United States v. Morrison*, 529 U.S. 598 (2000); BREYER, *supra* note 1, at 62. The majority in these cases accuses Justice Breyer of abdicating any judicial role in putting limits on Congress' Commerce Clause powers and relying exclusively on the political safeguards of federalism. See *Lopez*, 514 U.S. at 565-68. Breyer's response is that "two centuries of scientific, technological, commercial and environmental change . . . , taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce Since judges cannot change the world . . . , Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance." *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting).

44. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Amendment by imposing damage liabilities on states⁴⁵—and here Breyer sounds an interesting if not completely convincing variant on his active liberty idea. He criticizes these decisions largely on the ground that they will decrease active liberty at the local level, reduce the role of local governance, and produce less flexible and more national forms of regulation. These decisions seem easier to criticize on different grounds—both on originalist grounds and on the ground that Breyer emphasizes in his dissents in the Commerce Clause cases: that Congress is the preferred institution for deciding where the federal/state balance lies in these instances. Moreover, Breyer's arguments here rest in part upon predicted consequences of striking down the laws in question that subsequent experience may not have borne out. But Breyer's arguments in his dissents and book are original and important, and also have the advantage of moving beyond the common national sovereignty critique of the Rehnquist Court's federalism decisions to suggest that the Court majority was undermining its own professed commitment to localism.

Among the book's other applications of Breyer's active liberty theme, one stands out because it is the only specific area of law that Breyer discusses that he had not previously addressed in his judicial opinions, and it is a major one: affirmative action. Justice Breyer joined Justice O'Connor's majority opinion in *Grutter v. Bollinger*,⁴⁶ the landmark opinion upholding the use of affirmative action in the educational context. But until this book, Breyer had not previously explained his own views on the subject. The Madison Lecture in 2001, in which Breyer first developed the democratic participation theme, contains only the briefest mention of affirmative action in the specialized context of race-conscious districting.⁴⁷ Given that *Grutter* was decided after the Madison Lecture, it is reasonable to think that the general ideas in the Madison Lecture helped Breyer to see deeper links between his theme of democratic participation and the affirmative action issue; that *Grutter* gave Breyer the opportunity to think through and apply his new understandings in an actual case; and that the section on affirmative action in *Active Liberty* allowed him to present his ideas in his own voice. Thus, to a student of Breyer the Justice, the book's discussion of affirmative action contains particularly interesting news—

45. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

46. 539 U.S. 306 (2003).

47. Stephen Breyer, *Our Democratic Constitution*, The Fall 2001 James Madison Lecture at New York University Law School (Oct. 22, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html.

and it is important news, because Justice O'Connor's departure from the Court has made affirmative action one of the most important issues in play on the new Court.

We do not know what role Justice Breyer played in helping to develop Justice O'Connor's majority opinion in *Grutter*,⁴⁸ but the passages in the opinion that Breyer emphasizes in *Active Liberty* certainly echo his own ideas about democratic participation. For Breyer, the justification for affirmative action in the context of higher education does not rest fundamentally on either the idea that it is a remedy to overcome the effects of past or present discrimination or the idea that, under our First Amendment, universities should receive distinctive deference in making educational choices. Nor does he emphasize the contributions that a diverse student body makes to education in the university setting itself—the rationale in Justice Powell's famous *Bakke* opinion,⁴⁹ the central rationale offered by the University of Michigan itself in *Grutter*, and a significant part of Justice O'Connor's opinion. Rather, in *Active Liberty* Breyer justifies affirmative action as “necessary to maintain a well-functioning participatory democracy.”⁵⁰ He reads Justice O'Connor's opinion as ultimately resting on this active liberty and democratic participation theme, and quotes the following passage in which, he says, she drew her various other arguments together:

“[N]owhere is the importance of . . . openness more acute than in the context of higher education. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. . . . [Indeed,] the path to leadership [must] be *visibly* open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and

48. We do know that they were the only two Justices who voted to uphold the affirmative action program used by the University of Michigan's Law School in *Grutter* but also voted to strike down the affirmative action program used by the University of Michigan's undergraduate college challenged in the companion case of *Gratz v. Bollinger*, 539 U.S. 244 (2003). Because their two votes determined the outcomes in these exceptionally important cases, it is plausible to think that they discussed the cases. Breyer wrote only a brief separate opinion in the cases, stating his votes and adding that even though he disagreed with the dissenters in *Gratz*, he agreed with them that “government decisionmakers may properly distinguish between policies of inclusion and exclusion.” *Id.* at 282 (Breyer, J., concurring).

49. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

50. BREYER, *supra* note 1, at 82.

integrity of the educational institutions that provide this training. . . .
[And] all [must] participate”⁵¹

Although this is indeed a quotation from O'Connor's majority opinion, Breyer's ellipses and brackets focus on Breyer's own interpretation—culminating in the last sentence, which is largely a reconstruction and which focuses attention on the theme of “participation.”

Breyer then adds, in altogether his own words:

What are these arguments but an appeal to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*? They find some form of affirmative action necessary to maintain a well-functioning participatory democracy. . . . [If affirmative action were outlawed, too] many individuals of all races would lack experience with a racially diverse educational environment helpful for their later effective participation in today's diverse civil society. Too many individuals of minority race would find the doors of higher education closed; those closed doors would shut them out of positions of leadership in the armed forces, in business, and in government as well; and too many would conclude that the nation and its governmental processes are *theirs*, not *ours*. If these are the likely consequences—as many knowledgeable groups told the Court they were—could our democratic form of government then function as the Framers intended?⁵²

Active Liberty discusses a variety of other areas of constitutional law—ranging from privacy and religious freedom to criminal procedure and desegregation—but there is at least one noteworthy omission. Unmentioned, and perhaps understandably so, is the most momentous and controversial constitutional case of Breyer's tenure at the Court: *Bush v. Gore*,⁵³ the case that effectively ended the Presidential election of 2000 and one that certainly engages the book's theme of democratic participation.⁵⁴

51. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 332–33 (2003) (citations omitted)).

52. *Id.* at 82–83. Note his emphasis on “consequences” as a guide in giving meaning to the Equal Protection Clause and his reliance on the amicus briefs to inform him about real-world consequences.

53. 531 U.S. 98 (2000).

54. Breyer also does not mention two other cases with overtones of presidential politics in which he wrote opinions: *Clinton v. Jones*, 520 U.S. 681, 710–24 (1997) (Breyer, J., concurring), the famous case in which President Clinton unsuccessfully sought to defer a sexual harassment suit against him until his term of office ended, in which Breyer wrote an opinion formally styled as “concurring in the judgment” but that was in many respects a dissent, and *Rubin v. United States ex rel. Independent Counsel*, 525 U.S. 990 (1998) (Breyer, J., dissenting from the

No sketch of Breyer can ignore the case, however. Breyer's dissent in *Bush v. Gore* is a *cri de coeur*, as impassioned an opinion as Breyer has ever written, addressing what he clearly saw as a calamity for the Supreme Court. Even though written under extraordinary time pressures, it both dissects the majority's legal arguments with analytic power and clarity, and also expresses his vision of the Supreme Court as a national institution. Uncharacteristically, Breyer's dissent begins with a rhetorical blast of a pair of "wrong" and "wrong": "The Court was wrong to take this case. It was wrong to grant a stay."⁵⁵ And what immediately follows is a statement of the opinion's insistent theme, that even though "[t]he political implications of this case for the country are momentous[,] . . . the federal legal questions presented . . . are insubstantial,"⁵⁶ and that the proper role for the Supreme Court here was to be restrained.

Breyer's legal analysis takes apart the majority's particular arguments one by one. But the particular force of Breyer's opinion is in Part II, in which he pleads for the Supreme Court to stay out of this ultimate political moment in a democracy. Under both the Constitution and Congressional statutes drafted after the wrenching experience of the contested 1876 election, Breyer argues, Congress has the ultimate authority and responsibility to count electoral votes. Anticipating one of *Active Liberty*'s themes—indeed, perhaps partly animating it—Breyer writes: "However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about."⁵⁷

Drawing upon Professor Alexander Bickel's writings about the 1876 election, in which Justices of the Supreme Court played a key role, Breyer closes his opinion with lessons from that history and with anguished concern for the Court as an institution. Describing the Justices' role in the 1876 election, but perhaps also expressing his own anxiety about how to understand the majority's actions in *Bush v. Gore*, Breyer observes that "[m]any years later, Professor Bickel concluded that [Justice] Bradley was honest and impartial."⁵⁸ But the role of Justice Bradley and other Justices in the 1876 election "did not

denial of the writ of certiorari), in which Breyer wanted to consider the establishment of an evidentiary privilege to limit testimony by Secret Service agents protecting the President. Each opinion is marked by a characteristic focus on the practical consequences for the constitutional interests at stake.

55. 531 U.S. at 144 (Breyer, J., dissenting).

56. *Id.*

57. *Id.* at 155.

58. *Id.* at 156.

lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.”⁵⁹ Turning explicitly to *Bush v. Gore*, he wrote that one reason for judicial self-restraint is that the “sheer momentousness” of this kind of case “tends to unbalance judicial judgment.”⁶⁰ “And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation.”⁶¹ Here, Breyer seems to be reminding us of *Brown v. Board of Education*, which he has invoked on many occasions as the paradigmatic case of how the Court’s reserve of legitimacy allowed it to bring transformative benefits to the justice of our country. Breyer adds: “[That public confidence] is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.”⁶²

None of the carefully polished prose about democratic participation and judicial modesty in *Active Liberty* has more power or resonance than Breyer’s dissent in *Bush v. Gore*, hastily crafted in the midst of battle, propelled by the particularity of litigation, and informed by the history it remembered and recognized was being made.

I have focused thus far on *Active Liberty*’s substantive theme about the Constitution—the theme of democratic participation. But the book also develops important methodological themes about how to approach the task of legal interpretation. Judges, Breyer argues, should consider the purposes of the legal provision in question and the practical consequences of various possible interpretations, and not look only to the language of the law, the original intent of its adopters, or precedent. In addition, Breyer argues, particularly in close cases, judges should avoid wooden doctrinal formulas and rigid rules, because they frequently need to balance a variety of factors, make pragmatic judgments, and see matters of degree as dispositive. Approaching legal interpretation in this way, Breyer says, will not only determine legal meaning most accurately

59. *Id.* at 157.

60. *Id.* (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962)).

61. *Id.* at 157.

62. *Id.* at 157–58.

but also promote democratic values more fully and pragmatically. Breyer's methodological arguments present an important intellectual challenge to the interpretive method defended with intellectual force by Breyer's colleague, Justice Antonin Scalia.⁶³

The most significant criticism of Breyer's methodological approach, even by those who praise the book, is that it leads to judicial subjectivity and legal indeterminacy.⁶⁴ Breyer anticipates the criticism in a full section of his book titled, with characteristic directness, "A Serious Objection." Although Breyer does not put it this way, much of the criticism reflects an exaggerated view that leeway can be eliminated from Supreme Court decisions. The Supreme Court, however, is frequently interpreting general provisions of the Constitution or imprecise provisions in federal statutes. A Justice has available a wide range of tools for interpreting these provisions, drawing upon a variety of sources (text, precedent, legislative history, and so forth). Inescapably, there is leeway for choice—choice in method of interpretation, and choice in the meaning given to a provision—choices that will inevitably be shaped in part by a judge's experience and fundamental beliefs and choices that will require the judge to make reasonable judgments and not just engage in logical deduction. This is especially so with cases decided by the Supreme Court, which are the typically borderline and difficult cases that have no clear answers. One of Breyer's contributions is that he acknowledges these inescapable truths and is explicit about the basis for his own choices.

Breyer's basic answer to the concerns about subjectivity is to argue that (1) alternative approaches have subjective elements as well; (2) his approach has more constraints than critics will acknowledge; and (3) even if there is somewhat more leeway for judicial choice in his method, there are more than compensating benefits. Breyer is especially strong in summarizing the various indeterminacies and subjectivities of originalism. Concerning constraints in his own method, Breyer emphasizes that examining purposes and consequences does not displace the important—and importantly constraining—role that text, history, and precedent also should play.

Two of Breyer's other arguments about constraints warrant special emphasis since they tend to be ignored or downplayed by his critics. The first is Breyer's argument that his method brings to the surface factors that are often in play but undisclosed in other methods, and that the transparency of his method is itself an important constraint. "There is no secret. There is no

63. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

64. See, e.g., Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 *YALE L.J.* 1719, 1732-36 (2006).

hidden agenda. What you see is what you get," Breyer has stated.⁶⁵ His opinions often rest upon many diverse factors, but their relevance is explained—and when there is a pivot point of difficulty or judgment, Breyer will tell you. Transparency is a check on the judge, both because it disciplines the judge's own thought and because the judge is opening himself to disciplining criticism from others. Breyer also argues that his method requires the judge to act with a sense of humility and caution—to defer to other institutions often, and, when intervening, to take small bites in recognition of the complexity of both the method and the issues. This is a point at which Breyer's substantive theme of democratic participation and his methodological themes come together, because they both counsel the judge to defer frequently to other decisionmakers.

Cynics may be dismissive of invocations of humility by those with power, but humility and caution are particularly appropriate to demand of judges in a democracy, and Breyer's record supports that he practices what he preaches. In the study mentioned earlier, Breyer was the most deferential to Congress of any of the Justices on the Court. (The criticisms of Breyer's book by Robert Bork and George Will, that it is a license for judicial activism or the announcement of an ambitious liberal program, simply ignore what Breyer says and the clear evidence of his cautiousness and deference to other institutions.⁶⁶) Breyer's opinions often rest upon the combination of so many factors that they leave to the future how he would decide closely related cases, itself an expression of a constraining humility and caution.

Of course, purposes are not always easily characterized, and consequences not always easy to predict. The question is whether an interpretive effort—such as originalism—that deems purposes and consequences off limits produces better law than interpretation that gives attention to these factors and is accompanied by a self-conscious effort to minimize (eliminate would be impossible) the imposition of the judge's own personal value choices. Breyer's ultimate argument is that even if his method may sometimes provide judges more room for judgment than a strict originalist or textualist approach, there are more than compensating benefits—a law that better carries out the purposes of the Constitution and of statutes, and that better serves the country. Here, of course, Breyer's method merges with his understandings of substantive constitutional meaning. For example, to say that any restriction on speech in a negative liberty sense triggers strictest scrutiny might be more determinate than Breyer's approach, but for Breyer it would be wrong. Rigid

65. Breyer, *supra* note 13, at 17.

66. Robert H. Bork, *Enforcing a "Mood,"* NEW CRITERION, Feb. 2006, at 63; George F. Will, *Mr. Breyer's 'Modesty,'* NEWSWEEK, Sept. 26, 2005, at 72.

doctrinal rules might reduce a judge's leeway for judgment, but Breyer believes that the right constitutional meaning is often found in a context-specific balancing of multiple factors, judgments of "proportionality,"⁶⁷ and matters of "degree."⁶⁸

A further question, which Breyer does not really address, is whether his method can work well in the hands of the ordinary judge without Breyer's social understanding and good sense. It takes a true virtuoso to play Beethoven's late piano sonatas—and the ordinary pianist would be advised to play simpler though inferior music. In the hands of others, perhaps the results would be less pleasing. This is a common critique by those who favor legal rules over standards,⁶⁹ and it is certainly a fair question to ask about Breyer's approach.

As both Richard Posner and Cass Sunstein note in this issue,⁷⁰ Breyer's policy orientation does a considerable amount of the work in the decisions he reaches—his commitment to democratic participation and his methodology do not by themselves produce his results. Other judges might conceivably invoke his themes and use his method and reach results that I, for one, would cheer less, because they draw different implications from a commitment to democratic participation, identify purposes of legal provisions that are less congruent with my understanding, and assess likely consequences in less plausible and less insightful ways. But Breyer's method requires transparency at the points at which judgment or policy comes into play, and transparency not only constrains but also invites candid dialogue. Breyer's method also insists upon a genuine attitude of humility and deference, and that prevents excessive judicial intrusion in democratic processes. If you believe, as Breyer believes, that leeway and some measure of policymaking are inescapable parts of judicial decisions in the distinctively difficult, borderline, and contested issues that reach the Supreme Court, the comparative advantages of Breyer's approach become clearer. It may not eliminate debates in particular cases, but it

67. BREYER, *supra* note 1, at 49. For a brief discussion of Breyer's reliance on the concept of proportionality, see Gewirtz, *supra* note 33, at 195-98.

68. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) ("The majority believes [my] conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. And in this case the failings of degree are so serious that they amount to failings of constitutional kind." (citations omitted)).

69. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

70. Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006); Sunstein, *supra* note 64.

puts those debates on a more open terrain. And it leaves great room for debate to be had, and choices made, in more democratic institutions.

I noted at the outset that *Active Liberty* should be seen as a work of induction, in which Breyer discerned a pattern and themes in his earlier judicial opinions. Perhaps not surprisingly, writing this book (and its precursors, the 2001 Madison Lecture and the 2004 Tanner Lectures) seems to be having an effect on Breyer's continuing judicial work.

I have already noted the apparent effect his democratic participation theme seems to have had on his approach to the 2003 campaign finance cases and affirmative action cases (in which he did not write major opinions). But we can also see the democratic participation theme playing out in less prominent cases in which Breyer has written opinions. In *Board of Education v. Earls*,⁷¹ for example, Breyer split off from his liberal colleagues and concurred in a judgment upholding a school district's policy of conducting drug testing of students participating in competitive extracurricular activities. At a pivotal point in his concurrence he notes:

When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community the opportunity to be able to participate in developing the drug policy. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process . . . revealed little, if any, objection to the proposed testing program.⁷²

In another case, *Ring v. Arizona*, Breyer actually reversed his conclusion in an earlier case, and concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."⁷³ His conclusion rests upon his view that, given the extensive debates about the appropriateness of the death penalty, jury sentencing "will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted."⁷⁴ Put

71. 536 U.S. 822 (2002).

72. *Id.* at 841 (Breyer, J., concurring) (internal quotation marks and citation omitted).

73. 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

74. *Id.* at 618.

another way, the jury's role will provide fuller democratic participation by the community in the death penalty decision.

We can also see a new self-conscious deployment of his methodological emphasis on looking to purposes and consequences in interpreting laws. Most striking is Breyer's application of this method—which was fully articulated in the 2004 Tanner Lectures—in the two 2005 cases involving public displays of the Ten Commandments that were decided after he delivered those lectures.⁷⁵ The Ten Commandments cases are especially noteworthy because Breyer ended up being the pivotal Justice in each case, providing the decisive fifth vote to allow the display in one case and the decisive fifth vote to disallow it in the other.⁷⁶ As the only Justice to reach different conclusions in the companion cases, he was at the center of the Court, but there alone. It cannot have been an easy place to come to rest. But there is nothing tentative in Breyer's opinions—the tone is self-confident, the voice of a judge comfortable with his method of decision and where it has led him. And the method is explicitly all about the purposes of the Establishment Clause and the consequences of one interpretation over another⁷⁷—Breyer's most developed use of these concepts in any opinion he has written.

Breyer's earlier opinions, we have seen, evolved into this book. His recent opinions demonstrate that his book is now producing evolutions in his opinions, which are making more self-conscious use of ideas developed in his book.

III. CIVIC ENGAGEMENT

One final part of the sketch is necessary: Breyer's theme concerning the citizen's active participation in public life is expressed not only in his legal ideas but also in his own activities of civic engagement. Several times in his book Breyer quotes John Adams's phrase extolling citizens' "positive passion for the public good"⁷⁸—and the phrase fits Breyer himself, not just as a description of his personality but also of the way he understands his judicial role. A Supreme

75. Stephen Breyer, *Our Democratic Constitution*, Harvard University Tanner Lectures on Human Values (Nov. 17-19, 2004), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html. Indeed, after the Tanner Lectures were delivered and he had written his opinion in the Ten Commandments case, Breyer added a section on those cases to the chapter on methodology in *Active Liberty*. BREYER, *supra* note 1, at 122-24.

76. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005).

77. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment).

78. BREYER, *supra* note 1, at 3, 135.

Court Justice can help to educate society. A Supreme Court Justice needs to understand society.

He believes that one of his roles is to educate and engage the general public about the Supreme Court and about our government institutions. His opinions are remarkably jargon-free, and, for all of their analytic brilliance, they are usually written as if they are to be read by ordinary citizens. His opinions have no footnotes (they are full of citations, of course, but these are embedded in the text), which I take to be a symbolic assertion that his opinions are arguments to the public, not a scholar's writings. He is one of the Court's most active (and wittiest) participants at oral argument; and because oral arguments often receive as much press coverage as the Court's actual opinions, this in practice, if not intent, provides another channel for him to educate the public. He sees great value in amicus briefs filed with the Court since they inform him about the real world of things and the potential consequences of legal rulings.⁷⁹ But he also remains involved with society directly.

One reason that *Active Liberty* is an important book is that it aspires to reach a wider audience of readers than legal scholars, other judges, and lawyers.⁸⁰ The book seeks to contribute to the public's understanding of not only the Supreme Court, but also, and perhaps above all, the public's own role in our democratic system. Justice Breyer has done a remarkable number of interviews related to the publication of this book—for example, he has done television, radio, print and other interviews with George Stephanopoulos (ABC News), Larry King (CNN), Jim Lehrer (PBS), Charlie Rose (PBS), Linda Greenhouse (*New York Times*), Jeffrey Toobin (*New Yorker*), Nina Totenberg (NPR), and Stuart Taylor (*National Journal*), among others. While taking pains to explain how the Supreme Court works, these interviews all emphasize the public's own responsibilities to participate in our political life, and are acts of public encouragement.

Even before the book appeared, Breyer was willing to speak to general audiences, to university entities, to bar associations and other nonprofit organizations, and to participate in conferences of all sorts.⁸¹ Some of his colleagues lead quite insular lives as Justices, whether out of a sense of self-protection or propriety, but Breyer has resisted that. He participates in

79. *Id.* at 41-42.

80. Breyer has recounted that the origin of this book was a meeting at the Carnegie Foundation where he, Justice O'Connor and Justice Kennedy were discussing how to teach high school students about the Constitution. See Breyer, *supra* note 13, at 7, 8.

81. A partial listing of Breyer's speeches and public appearances is provided on the Supreme Court's website at <http://www.supremecourtus.gov/publicinfo/speeches/speeches.html> (last visited Mar. 22, 2006).

Washington, D.C.'s social life, and he spends considerable time in his longtime home of Cambridge, Massachusetts, as a member of that community. (Indeed, the book jacket's description of Breyer has only two sentences: the first says that he is an associate justice of the Supreme Court, and the second says that "He is a resident of Cambridge, Massachusetts, and Washington, D.C."—in that order.)

Like most of his colleagues, at the Court he often receives delegations from foreign countries, most typically judges from other countries' courts. In turn, like other of his colleagues, he also regularly accepts invitations to speak abroad about the American legal system—sometimes under the auspices of the U.S. Department of State. In this respect, he is essentially a diplomat. The American legal system and our commitment to the rule of law is widely admired around the world—it is part of our "soft power" as a country. A Supreme Court Justice speaking to a foreign audience about our country and its legal system brings particular attention to them, improves understanding of our system, and contributes to America's standing in these countries.⁸² In the course of these visits and exchanges, Justice Breyer himself learns about the work of foreign courts. This, along with the increasing practice of lawyers in cases before the Supreme Court bringing foreign materials to the Court's attention, has made Justice Breyer a leading proponent of the idea that it is sometimes valuable for our courts to consider the experiences of other countries in the course of making decisions—not because those foreign decisions in any way bind us or shape the meaning of U.S. legal texts, but because they may provide useful insights and even empirical experience with particular kinds of issues.⁸³

Breyer also believes that a Supreme Court Justice is part of the American government system, not apart from it. This understanding of his role is expressed in numerous and, at times, unusual ways. For example, Breyer is single-handedly carrying forward the old tradition that members of the Supreme Court attend the State of the Union address. The rest of his colleagues no longer attend. (This year was an exception, apparently because the State of the Union address took place the same day that Justice Samuel Alito was sworn into office.) The attendance of Justices at the State of the Union address, however traditional, certainly produces some awkward moments, since the President's remarks are often highly political and

82. For example, Justice Breyer also regularly attends the annual Global Constitutionalism Seminar at Yale Law School, which brings together justices from supreme courts and constitutional courts around the world with the Yale faculty to discuss issues of common interest.

83. Stephen Breyer, Keynote Address Before the 97th Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003).

nowadays members of Congress frequently either stand to cheer or put on sullen expressions for the TV cameras; an attending Justice typically sits benignly, neither cheering nor disapproving. But Breyer's persistence in attending reflects, I think, not only his sense that members of the Court should participate in this symbolic event. It also reflects one aspect of Breyer's characteristic optimism: Yes, we have separate branches of government and they each must check the other; but we are in the end one Union with a set of common purposes.

Breyer believes this. His public interviews and speeches are filled with optimism.⁸⁴ He emphasizes again and again the large area of common ground within the United States, in understandings about the Constitution, and even concerning cases that come to the Supreme Court. His optimism is expressed not simply in overt expressions of faith in American institutions, but in his basic problem-solving style. He believes that common ground can be found. And when a problem can't be solved—in the sense that common ground for a sensible solution can't be found—he emphasizes that the question at issue is a close one, that each side has something to be said for it. Many others have contrasted Justice Breyer and Justice Scalia in terms of their interpretative methods and judicial philosophies. But there is also a marked contrast in their temperaments, including their judicial temperament: One is a witty provocateur, the other is a cheerful problem solver. They share a zest for expressing their different temperaments, but one emphasizes differences and enjoys the posture of adversary, the other emphasizes commonalities and enjoys the role of conciliator.

Breyer's optimism, especially about American institutions, explains why *Bush v. Gore* was such a significant event for him—it was a major challenge to his faith in the essential wisdom of our institutions and the nonpartisanship and professionalism of judging. But, significantly, in his limited public comments on the case since it was decided he has said only two things: First, he thinks he was right; and, second, the country accepted the Court's decision, and this is a sign of how strong our institutions are and how strong the public's faith in our institutions is.⁸⁵ One senses that he has bracketed *Bush v. Gore* in his understanding of both the Supreme Court and the country. It was a terrible mistake, but we have moved on—and we can move on without drawing harsh lessons that Supreme Court decisionmaking is inherently or pervasively partisan or corrupt. It was a terrible mistake, but our country will survive it—and Breyer's faith has survived it.

84. See, e.g., Breyer, *supra* note 13, at 39.

85. *Id.* at 38-39.

Of course, one consequence of *Bush v. Gore* is that it indeed did change Breyer's life. President Bush is reshaping the Supreme Court with his talented and strongly conservative appointments, and this has made it more likely that Breyer will remain in the minority bloc for the foreseeable future, perhaps for the remainder of his career. It is difficult to see Breyer playing a larger role as a consensus builder now that Justice O'Connor has left the Court. There is the chance, of course, that given the lawyerly professionalism of the two new appointees, John Roberts and Samuel Alito—and the fact that they, like Breyer, enjoy the detailed analysis of cases and seem often to decide cases narrowly—Breyer will find significant areas of common ground with them, even in borderline and particularly important cases. In any event, although usually characterized as part of the conservative bloc, Justice Kennedy will retain his comparatively centrist and at times unpredictable place on the Court, so Breyer still might play a role as a shaper of majority positions if common ground is found with Justice Kennedy.

In that role, it is important to remember that Breyer himself is at times an unpredictable liberal. To mention just a few examples, he has split with Justices Stevens, Souter, and Ginsburg on a variety of important cases, including some free speech cases,⁸⁶ one of the Ten Commandments cases,⁸⁷ the affirmative action case involving the University of Michigan's undergraduate college,⁸⁸ and some criminal procedure cases,⁸⁹ among others. There is also, of course, the chance that a Democrat will be elected President in 2008 and that the Court can be reshaped yet again before Breyer retires so that he becomes a shaper of more progressive majority positions. But at the moment all of this is most uncertain.

Thus, Breyer is a judge of extraordinary quality, but has no clear majority on the Court to follow his lead. If this does not change, what will Breyer's path be? Greatness as a Justice, as the examples of John Marshall Harlan, Louis Brandeis, and Robert Jackson demonstrate, does not require a commanding role as leader of majorities. It can be based on a powerful judicial identity; a set of ideas; a method and an integrity that gain deeper recognition and influence over time; and even influential roles played outside the Court's daily work. We

86. *Ashcroft v. ACLU* 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting); *United States v. Am. Library Ass'n*, 539 U.S. 194, 215-20 (2003) (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting).

87. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868-73 (2005) (Breyer, J., concurring).

88. *Gratz v. Bollinger*, 539 U.S. 244, 281-82 (2003) (Breyer, J., concurring in the judgment).

89. *E.g.*, *Minnesota v. Carter*, 525 U.S. 83 (1998); *see also* *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

can predict that, for Justice Breyer, the theme and method set forth in *Active Liberty* will give his ideas an influence that individual judicial opinions almost never can have. He will continue to be a powerful individual voice on the Court with a distinctive approach, method, and set of ideas—implementing the pragmatic strain in American thought in a way rarely seen within the American judiciary. Over time, one can imagine that Justice Breyer will find other specific areas of law that he can rethink in detail with a new perspective, as he has already done with his innovative approach to the First Amendment. One can also expect him to continue his own activities of civil engagement outside the courthouse, filling crucial gaps in the American public's understanding of our public institutions, and acting as an unusually effective public diplomat for American legal institutions and for the United States abroad.

He may even find the time for other important books like *Active Liberty*. We are lucky to have this one.

Paul Gewirtz is the Potter Stewart Professor of Constitutional Law, Yale Law School. He is especially grateful to Chad Golder for his extensive and invaluable help with this effort, and to Robert Wiygul for his excellent research assistance. In the interests of full disclosure, the author notes that he was thanked by Justice Breyer on the acknowledgments page of Active Liberty.

THE YALE LAW JOURNAL

RICHARD A. POSNER

Justice Breyer Throws Down the Gauntlet

A Supreme Court Justice writing a book about constitutional law is like a dog walking on his hind legs: The wonder is not that it is done well but that it is done at all. The dog's walking is inhibited by anatomical limitations, the Justice's writing by political ones. Supreme Court Justices are powerful political figures; they cannot write with the freedom and candor of more obscure people. But just as Shakespeare managed to write great plays under official censorship, so Justice Breyer has managed to write a good book under self-censorship.

In recent years, the initiative in constitutional debate has passed to the conservatives. They have proposed, and to an extent achieved, a rolling back of liberal doctrines (notably in regard to states' rights, police practices, and executive power) and of the methodology of loose construction that enabled liberal Justices to provide a plausible justification for those doctrines. The liberals continue to win a significant share of victories, in such areas as homosexual rights, affirmative action, and capital punishment, but for the most part their stance, their outlook, has been defensive: defense of the Warren Court and *Roe v. Wade*. Justice Breyer is a liberal (though a moderate one), but he wants to do more than defend liberal decisions, doctrines, and methods piecemeal. He wants an overarching approach to set against the "textualism" and "originalism" of his judicial foes. His book articulates and defends such an approach, which he calls "active liberty."

The book is short, and not only clearly written but written on a level that should make it accessible to an audience wider than an audience of judges and lawyers. And despite its brevity and simplicity it will be welcomed by constitutional lawyers, perhaps even by some of Breyer's colleagues, as a rallying point for liberal constitutional thought. It is a serious, and perhaps an important—it is certainly likely to be an influential—contribution to constitutional debate. The short book of Scalia's against which Breyer is

writing¹ has been cited in more than a thousand law review articles.² Breyer can expect similar attention to his book.

But while acknowledging its merits and likely influence, I do not find *Active Liberty* convincing, and will devote the bulk of this Review to explaining why. So first—what is “active liberty”? Breyer, following Benjamin Constant, distinguishes between the “liberty of the ancients” and the “liberty of the moderns,” and aligns active liberty with the former. He fails to note that Constant was writing *against* the “liberty of the ancients,” which Rousseau had introduced into French political thought with tragic results, and in favor of the “liberty of the moderns.”³ To Constant, the liberty of the ancients signified the collective exercise of sovereignty devoid of any concept of individual rights against the state.⁴ It was an extreme version of what we now call “direct democracy,” which is illustrated by referenda in California and Switzerland and by the New England town meeting. The liberty of the moderns, by contrast, is liberty from state oppression. It is what Isaiah Berlin called “negative liberty.”⁵ It is what citizens of Athens and of revolutionary France lacked. Its instruments include representative democracy (not direct democracy, as in ancient Athens), separation of powers, federalism, and the type of legally enforceable rights against government that are found in the Bill of Rights.

Breyer understands by liberty of the ancients the liberty that Athenian citizens enjoyed for much of the fifth and fourth centuries B.C.⁶ by reason of

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Scalia's is a short book, all right, but it is not really *his* short book. His contribution to it is limited to a lead essay (entitled, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*) and a reply to critics, *id.* at 129. See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
 2. The search that produced this figure was of articles in Westlaw's JLR (Journals & Law Reviews) database. Despite the extreme brevity of Scalia's discussion of constitutional as distinct from statutory interpretation in SCALIA, *supra* note 1, at 37-47, my impression is that most of the law review commentary has focused on his approach to constitutional interpretation.
 3. BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in *POLITICAL WRITINGS* 309 (Biancamaria Fontana ed. & trans., 1988). With reference to Rousseau, see *id.* at 319-20.
 4. *Id.* at 311-12.
 5. ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY* 166, 169-78 (Henry Hardy ed., Oxford Univ. Press 2002) (1958).
 6. JOSIAH OBER, *THE ATHENIAN REVOLUTION: ESSAYS ON ANCIENT GREEK DEMOCRACY AND POLITICAL THEORY* 31 (1996); see also R. K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN*

the fact that their city was a democracy. Constant, on the contrary, believed Athens to have been the ancient state that “most resembles the modern ones,”⁷ and Sparta a better example of the liberty of the ancients.⁸ But Athens was actually an excellent example of that liberty. The Athenian Assembly, to which all citizens belonged, had plenary power; there were no legislators other than the citizens themselves when attending its sessions. To prevent the emergence of a political class, the few executive officials were chosen mainly by lot, for one-year terms, though some were elected and could be reelected.⁹ Similarly, there were no judges except randomly selected subsets of citizens—jurors who voted without deliberating, unguided by jury instructions, since there were no judges to give such instructions. For that matter, there was no legal profession, though orators such as Demosthenes would draft speeches for the litigants to give at trial. There was plenty of litigation, but no concept that people had rights to life, liberty, or property that could be enforced against the polis. The only justice was popular justice.

To lodge executive and judicial power in randomly chosen citizens, and legislative power in whatever citizens choose to attend legislative sessions, is to carry self-government about as far as it can be carried. It is town meeting government writ large. It is not a feasible model for a nation of 300 million people. Breyer knows this, though he says that the Court should be doing more to promote the “active liberty of the ancients,”¹⁰ and underscores the point by saying that “‘active liberty’ . . . bears some similarities to . . . Isaiah Berlin’s concept of ‘positive liberty.’”¹¹ That was Berlin’s term for the “liberty of the ancients” as revived by Rousseau and extended, Berlin thought, by modern totalitarians!¹² Breyer does not want to turn the United States into a direct democracy on the model of ancient Athens, or on any other model. He says that “[d]elegated democracy” need not represent a significant departure from

ATHENS 68, 80 (1988). Some of the other Greek city states were also democratic during this period.

7. CONSTANT, *supra* note 3, at 312.

8. *Id.* at 310–11, 314–16.

9. JOHN V.A. FINE, *THE ANCIENT GREEKS: A CRITICAL HISTORY* 390–402 (1983); SINCLAIR, *supra* note 6, at 68, 80. So even the Athenians flinched from the full implications of direct democracy. SINCLAIR, *supra* note 6, at 193–95; *see also* RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 154 (2003) (discussing the problematic nature of representative “democracy”).

10. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005). He contrasts “active liberty” with “modern liberty.” *Id.*

11. *Id.* at 137 n.6.

12. *See* BERLIN, *supra* note 5, at 190–91.

democratic principle,”¹³ and by “delegated democracy” he means simply—representative democracy. All he really wants to do is to interpret the Constitution in a manner that will promote his conception of democratic choice by sweeping away obstacles to such choice. His project resembles that of John Hart Ely (cited by Breyer, though only in passing¹⁴), who argued that the major thrust of the Warren Court had been to make American government more democratic,¹⁵ but not democratic in the Athenian sense.

Because he is a judge, Breyer cannot acknowledge that he wants to impose his concept of active liberty on the Constitution. Convention requires him to find the concept in the Constitution. Manfully, he tries. He recognizes that it is an uphill struggle: “The primarily democratic nature of the Constitution’s governmental structure has not always seemed obvious.”¹⁶ Indeed not—and for the excellent reason that the structure is not “primarily democratic.” It is republican, with a democratic component. The Constitution’s rejection of monarchy (no king), aristocracy (no titles of nobility), and a national church (no religious oaths of office) was revolutionary; but the governmental structure that it created bore no resemblance to that of ancient Athens and was, and remains, incompletely democratic.

Of the major components of the federal government—the executive branch, consisting of the President and Vice President and other high officials; the judiciary; the Senate; and the House of Representatives—only the last was to be elected by the people. And since the Constitution created no right to vote and allowed the states to fix the eligibility criteria for voters for members of the House (except that the criteria had to be the same as those the state prescribed for voters or members of the lower house of its own legislature) states could limit the franchise by imposing property or other qualifications for voting. The President and Vice President were to be chosen by an Electoral College whose members would in turn be chosen by the states according to rules adopted by each state legislature; there was no requirement that those rules provide for popular election of the members of the College. Other executive branch officials would be appointed by the President or by the judges. Senators would be appointed by state legislatures. Supreme Court Justices (and other federal judges, if Congress took up the option conferred on it by the Constitution of creating federal courts in addition to the Supreme Court) would be appointed by the President, subject to senatorial confirmation, for life. Political parties

13. BREYER, *supra* note 10, at 23.

14. *Id.* at 146 n.14.

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

16. BREYER, *supra* note 10, at 21.

were not envisaged; the best men would rule, rather than the survivors of party competition. There was not a trace of direct democracy in the Constitution: no provision for initiatives, referenda, or recalls. The Framers purported to be speaking on behalf of “We the People,” as the preamble states, but there is no novelty in adopting a nondemocratic regime by plebiscite; ask Napoleon. Even the ratification of the Constitution was by state conventions rather than by direct popular vote. The Constitution guarantees a republican form of government (presumably similar though not identical to the republican form of government created by the Constitution) to each state, but not a democratic government.

If, as Breyer states, the Framers of the Constitution had “confidence in democracy as the best check upon government’s oppressive tendencies,”¹⁷ why is there so little democracy, and none of it direct democracy, in the document they wrote? What we see in the structure of the original Constitution is not an echo of Athens but an adaptation of the institutions of the British eighteenth-century monarchy to a republican ideology. The President corresponds to the king; he exercises the traditional monarchical prerogatives of pardoning, conducting foreign affairs, appointing executive officials and judges, and commanding the armed forces. He is of course not directly elected. The Senate and the Supreme Court correspond to the House of Lords, and the House of Representatives corresponds to the House of Commons; elected, but by a restricted franchise. Subsequent amendments and changing practices and institutions made the Constitution more democratic, but Breyer insists that the original Constitution, the Constitution of 1787, was animated by the spirit of Pericles. That is untenable. There is irony in an anti-originalist trying—and failing—to give a historical pedigree to his anti-originalist approach.

Breyer’s lack of interest in the actual texture or political background and suppositions of the Constitution is consistent with the loose-constructionist approach that he champions (quite properly in my opinion). But he would have been well advised to forget Athens, accept Constant’s and Berlin’s criticisms of the liberty of the ancients, cut loose his concept of active liberty from that unattractive precedent, and acknowledge that he is trying to improve representative democracy, a project antithetical to that of restoring the liberty of the ancients.

After setting forth his concept of active liberty and trying to give it a constitutional genealogy, Breyer offers a series of illustrations of how the concept would, if accepted as the true spirit of the Constitution, shape

17. *Id.* at 23.

constitutional law. He begins with free speech.¹⁸ He contrasts political and commercial speech, arguing that the former is entitled to much greater protection because it is central to democracy. But he also defends, against free speech objections, campaign finance laws that limit political advertising.¹⁹

The notion of the primacy of political speech is a common one, but it is misleading and unhelpful. Of course it is possible to imagine restrictions on political speech that would do more harm than restrictions on commercial speech; compare a blanket prohibition of criticizing officials with a prohibition against false advertising of diet pills. But it is also possible to imagine restrictions on political speech that do less harm than restrictions on commercial speech; compare a prohibition against advocating suicide bombing with a prohibition against all price advertising. And where do scientific and artistic expression fall in Breyer's hierarchy of speech categories? He doesn't say. It is especially easy to imagine restrictions on freedom of scientific inquiry that would be more destructive of the nation's power and prosperity than restrictions on political expression. Perhaps, other things being equal, restrictions on political speech *are* more serious than restrictions on other speech because they are more difficult to remove by the political process; but other things are rarely equal.

Breyer does not discuss the particulars of campaign finance reform. He is content to argue that placing some limits on contributions to political campaigns should not be held to infringe freedom of speech. He recognizes that to tell someone you can't spend \$1 million to buy a commercial extolling the candidate of your choice curtails expression; but he thinks that limiting the ability of the rich to spend unlimited amounts on campaign advertising is justified by its contribution to active liberty. Interpreted in the light of active liberty, the First Amendment is to be understood "as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process,"²⁰ and campaign finance laws have a "similar objective."²¹ They "seek to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation."²² This is a little vague, but the basic idea seems to be that if there are no limitations on individual

18. *Id.* at 39.

19. *Id.* at 43-50.

20. *Id.* at 46.

21. *Id.*

22. *Id.* at 47.

campaign contributions, candidates will confine their fundraising to a handful of fat cats and the ordinary people will become disaffected—alienated from the political process—because they will assume that policy is shaped by the interests of the rich and that the people's voice is not heard.

No evidence for this speculation is offered, and it is not very plausible. For one thing, the wealthy are not a monolith; they have competing interests. For another, they do not have the votes, and so their political advertisements are aimed at average people—and it is odd to think that the fewer political advertisements there are, the greater the amount of political participation there will be. That is like thinking that curtailing commercial advertising would result in more consumption. Furthermore, if some candidates court the wealthy, others will be spurred to raise money from the nonwealthy—something the Internet has made easier to do, as we learned in the last presidential election.

I am not suggesting that Breyer is wrong to think that campaign finance laws do not violate the First Amendment. If there is no evidence that they promote active liberty, there is also no evidence that they curtail free speech significantly. I am old fashioned in regarding the invalidation of a federal statute as a momentous step that should not be taken unless the unconstitutionality of the statute is clear, and the unconstitutionality of campaign finance laws is not clear. But active liberty does not advance the analysis because it does not yield an administrable standard. Breyer tells us that the proper standard for judging the constitutionality of a campaign finance law is one of “proportionality.”²³ The law’s “*negative* impact upon those primarily wealthier citizens who wish to engage in more electoral communication” is weighed against

its *positive* impact upon the public’s confidence in, and ability to communicate through, the electoral process. . . . Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?²⁴

“The inquiry is complex,” writes Breyer.²⁵ No; it is indeterminate.

23. *Id.* at 49.

24. *Id.*

25. *Id.* at 50.

"Weighing imponderables" sounds like an oxymoron (since "imponderable" is from the Latin *ponderare*, meaning "to weigh"), but isn't quite, because often a judge can know, even without quantification, that one interest is greater than another just as one can rank competing employees by their contributions to their firm without being able to quantify the contributions. (Ordinal ranking is simpler than cardinal.) In a negligence case, for example, neither the burden of precautions nor the probability and magnitude of the accident that will occur if the precautions are not taken may be quantified or even quantifiable, yet it may be apparent that there is a grave risk of a serious accident that could easily be averted (negligence), or that the cost of the precautions would be disproportionate to the slight risk of a minor accident (no negligence). But key terms in Breyer's test, such as "impact upon the public's confidence in, and ability to communicate through, the electoral process," and the "importance" of a challenged law's "electoral and speech-related benefits," are so indefinite that they cannot guide decision.

The broader problem is that abstractions like "democracy" and "active liberty" are so vague and encompassing that they can be deployed on either side of most constitutional questions. A decision invalidating a statute on constitutional grounds may seem undemocratic, but even if it is not a democracy-enhancing decision (as reapportionment decisions are widely thought to be), it can be defended as an application of the "higher democracy" embodied in the Constitution. So originalists are democrats along with the loose constructionists. Likewise federalists, who want to honor the democratic choices made at the state and local level, and nationalists who want to honor the democratic choices made at the federal level. And are judges more democratic when they are giving legislators a helping hand (loose construction) or when they are sticking to the statutory language (strict construction)?

Breyer's next set of illustrations of constitutional law as inflected by active liberty concerns federalism. At first glance this seems surprising. Federalism is especially remote from Athenian democracy. But Breyer argues plausibly that in a nation as large as the United States, a federal system is needed to give the citizenry a sense of full participation in political life, since issues at the state and local level are often both more important and more intelligible to people than issues involving the national government.²⁶ Yet his leading example of how federalism understood as a helpmeet to active liberty should shape constitutional doctrine is unconvincing. It concerns the question of whether the federal government should be allowed to compel state officials to assist in

26. *Id.* at 56-57.

enforcing federal law, as by requiring sheriffs to check on compliance with federal gun laws.²⁷ The Supreme Court has said no,²⁸ and Breyer disagrees, arguing that the federal government, if it can't force state officials to assist in administering federal programs, will need a larger bureaucracy and so will expand at the expense of state and local government. That is possible, but if the Court allowed commandeering, as Breyer wants, there would probably be more federal programs because some of their costs would have been shifted from the federal treasury to the states.

He challenges the recent decisions in which the Supreme Court has limited federal regulation by defining interstate commerce more narrowly than it had done since the 1930s.²⁹ His argument is that federal laws based on an expansive understanding of interstate commerce are democratic because "the public has participated in the legislative process at the national level."³⁰ But his active liberty defense of federalism was that political participation at the national level is less participatory than that at the state or local level. It therefore is unclear why he criticizes the Court for expanding the scope for political participation at the state or local level by narrowing the scope for federal regulation.

Here as elsewhere in the book Breyer chides his colleagues for failing to consider the consequences of their decisions. He wants them to "ask about the consequences of decision-making on the active liberty that federalism seeks to further" and to "consider the practical effects on local democratic self-government of decisions interpreting the Constitution's principles of federalism."³¹ Breyer's emphasis on consequences is consistent with the common view of him as a pragmatic judge. I think that there is considerable truth to this view. He is the author of two of the most important pragmatic decisions of recent years—his majority opinion in the *Booker* case, an opinion that saved the federal sentencing guidelines from what would have been, in my opinion, a senseless invalidation of them,³² and his balance-tipping concurring opinion in the Texas Ten Commandments case,³³ which spared us a national search-and-destroy mission against all displays of the Ten Commandments on

27. *Id.* at 58-63.

28. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

29. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

30. BREYER, *supra* note 10, at 62.

31. *Id.* at 63.

32. *United States v. Booker*, 125 S. Ct. 738 (2005); see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 56-57 (2005).

33. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005); see Posner, *supra* note 32, at 99-102.

public property. Not that he is a completely consistent pragmatist.³⁴ Nor does his pragmatism escape the objection that pragmatism, as actually practiced by judges, fails to cabin judicial discretion. The pragmatist eschews theory and focuses on consequences, which is fine by me, but if the consequences cannot be measured or even estimated but only conjectured, the judge is left at large. As with Breyer's rhetorical questions about the effects of campaign finance laws, his suggestion that judges "ask about the consequences of decision-making" for "active liberty" and "consider the practical effects" on "local democratic self-government" founders on the inability to measure the effects of a statute or judicial decision on "active liberty" or "local democratic self-government." When would one know that some law had impaired such elusive phenomena?

The chapter on federalism endorses an approach proposed many years ago by Alexander Bickel and more recently by Guido Calabresi for promoting "dialogue" between courts and legislatures.³⁵

Through a hard-look requirement, for example, the Court would communicate to Congress the precise constitutional difficulty the Court has with the statute at issue without resorting to permanent invalidation. Congress, in reenacting the statute, would revisit the matter and respond to the Court's concerns. A clear-statement rule would have the Court call upon Congress to provide an unambiguous articulation of the precise contours and reach of a given policy solution. Those doctrines would lead the Court to focus upon the thoroughness of the legislature's consideration of a matter.³⁶

This kind of coercive, one-sided dialogue would tie Congress in knots. Offered by Breyer as an olive branch to a democratically elected branch of government, it actually would expand judicial power at the expense of the legislature by invalidating legislation not because it clearly violated the Constitution but because it failed to meet the Court's criteria of thoroughness, clarity, and precision. "Thoroughness" is an especially unsatisfactory criterion of constitutionality.

Next follows a chapter on informational privacy. Breyer points out sensibly that new technologies have altered the landscape of privacy. Courts should

34. *Id.* at 96-99.

35. See, e.g., *Quill v. Vacco*, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

36. BREYER, *supra* note 10, at 64-65.

hesitate to offer definitive answers when there is so much uncertainty and change. Instead the answers should be allowed to “bubble up from below” in a process “best described as a form of participatory democracy.”³⁷ He illustrates with a decision in which the Court held that a federal statute that forbade broadcasting a private cell phone conversation, which some unknown person had intercepted with a scanner and delivered to a radio station, violated the First Amendment.³⁸ Breyer wrote a concurring opinion that emphasized three features of the case and indicated that he might have voted differently had any of them been missing: The radio station had been an innocent recipient of the tape of the illegally intercepted conversation; the conversation, which was between two union officials, was a matter of public interest because it contained a threat (though it seems to have been just talk) of damaging property; and the conversation was about business rather than about intimate private matters, so the affront to privacy in broadcasting the conversation was less than it might have been.³⁹

All this has little to do with “participatory democracy,” or for that matter with new technologies. The decision subordinates the privacy of conversations to the interest of the media in disseminating matters that the public may be interested in learning about. The principal effect of the decision may be to discourage the use of analog cell phones for discussion of sensitive matters. (Digital cell phones are harder to eavesdrop on than wired telephones, and most cell phones being sold nowadays are digital.) The irony is that the media know well the value of privacy of communications for themselves—newspapers and other news media are desperate to avoid having to identify their reporters’ confidential sources—but do not respect the same privacy interests of the subjects of their stories. Decisions that fail to protect the privacy of communications may result in fewer communications, with a resulting loss to freedom of speech and so, one might have thought, to active liberty.

Breyer turns next to affirmative action and declares his agreement with certain “practical considerations”⁴⁰ that Justice O’Connor had mentioned in her opinion for the Court in *Grutter v. Bollinger*,⁴¹ the case that upheld the affirmative-action program of the Michigan Law School. Those considerations are that American businesses and the American military consider affirmative action important to their operations and that effective integration of a group

37. *Id.* at 70.

38. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

39. *Id.* at 535-41.

40. BREYER, *supra* note 10, at 81.

41. 539 U.S. 306 (2003).

into the nation's civic life requires that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁴² What O'Connor seems to me to be saying, though one must read between the lines to get it, is that black people in America, because they lag so badly behind whites, need a helping hand to raise them to a level at which they will feel that they are well integrated into American society rather than feeling like members of a disaffected underclass.

I am comfortable with that ground for affirmative action, remote as it is from anything to do with Athenian democracy. Athens thrived on exclusion. Most of the population consisted of women, slaves, and aliens, none of whom had the rights of citizens; citizens comprised no more than twenty, and perhaps as little as ten, percent of the adult population.⁴³ I would not labor this obvious point if Breyer had not sounded a Rousseauian note in the series of rhetorical questions by which he seeks to tie O'Connor's analysis to active liberty: "What are these arguments but an appeal to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*?"⁴⁴ Solidarity and fraternity, yes, and these were ideals of Athenian society as of the French Revolution, but they are not, as he implies, democratic ideals. Nondemocratic societies have frequently achieved high levels of solidarity.

Breyer turns next to statutory interpretation. He makes good arguments against strict construction and in favor of using statutory language and other clues to infer the statute's purpose and then using that purpose to guide interpretation. But he overlooks the strongest argument against the purposive approach: that it tends to override legislative compromises. (He also overlooks the related possibility, emphasized in Cass Sunstein's review, of multiple purposes that may conflict.⁴⁵) The purpose of a statute may be clear enough, but may have been blunted, as the bill made its way through the legislative mill to enactment, in order to obtain majority support. If so, then using the purpose to resolve ambiguities might give the supporters of the statute more than they could have achieved in the legislative process.⁴⁶ And that would be undemocratic.

42. *Id.* at 332; BREYER, *supra* note 10, at 82 (quoting this passage).

43. For various estimates, see M. I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 51 (rev. ed. 1996); A. W. GOMME, *THE POPULATION OF ATHENS IN THE FIFTH AND FOURTH CENTURIES B.C.* 26 tbl.1 (1967); and MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 93-94 (J.A. Crook trans., 1991).

44. BREYER, *supra* note 10, at 82.

45. Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

46. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 276-77 (1990).

One begins to wonder whether Breyer's deepest commitment is to democracy or to good policies. There is a possibly revealing slip when he says that "an interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."⁴⁷ The slip is in referring to a singular legislator, as distinct from the legislature. Legislation is passed by cobbling together a majority of often fractious legislators representing different interests. Compromise is inescapable and often blunts single-minded purpose. The public is not a singularity either.

I am not suggesting that the purposive approach is wrong. Most of the gaps in statutes are unintentional, and there is no way to fill them sensibly without reflecting on what the statute seems to have been aimed at accomplishing. But this is the counsel of good sense rather than anything to do with the ideals of Athenian democracy—as is further shown by Breyer's proposal that the best way to implement the purposive approach is to adopt the "fiction" of the "reasonable legislator."⁴⁸ The interpreter asks not what the actual legislators thought, but what a "reasonable" legislator (again singular) thought. It is the judge who decides what is "reasonable," for remember that the reasonable legislator is a fiction. To suggest that this approach will "translate the popular will into sound policy"⁴⁹ is heroic even if one passes over the uncertainties buried in the idea of the "popular will." The concept of the reasonable legislator sounds more like a method of maximizing the judge's discretion in statutory interpretation.

What is true and important is that legislators may be quite happy for judges to impose "reasonable" interpretations on the legislative handiwork; otherwise the legislators will have to spend a lot of time amending. The "textualists" do legislatures no favor by insisting that statutes speak clearly; the conditions of the legislative process, and in particular the need to compromise in order to get statutes passed, makes it impossible for legislatures to promulgate unambiguous statutes. Judges clean up after legislators, which is fine, but it is an activity remote from anything to do with direct democracy. What Breyer should have said is that loose construction may make *representative* democracy work better.

47. BREYER, *supra* note 10, at 99.

48. *Id.* at 97-101. Breyer is borrowing here from HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

49. BREYER, *supra* note 10, at 101.

The concept of the reasonable legislator or “reasonable member of Congress”⁵⁰ recurs in Breyer’s chapter on administrative law. The focus is on *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*,⁵¹ which held that when a regulatory statute is ambiguous, the court should defer to the regulatory agency’s statutory interpretation, if reasonable. The theory is that in such cases statutory interpretation, though a quintessentially judicial task, has been delegated by Congress to the agency that enforces the statute, subject to only light judicial review. Breyer proposes that to decide in a particular case whether this delegation has occurred, the judge should “ask whether, given the statutory aims and circumstances, a hypothetical member [i.e., a reasonable member of Congress] would likely have wanted judicial deference in this situation,”⁵² or, contrariwise, would have wanted to decide the question for himself. I do not think that’s the right question. By hypothesis, the statute is ambiguous. Congress did not decide for itself, or, if it did, we don’t know what its decision was. The court will have to resort to “reasonable member” interpretation. Realistically, the question is whether Congress should be taken to have wanted the courts to resolve the ambiguity or the regulatory agency. I don’t know how to answer such a question.

Toward the end of the book Breyer discusses the objection, raised by textualists such as his frequent sparring partner Justice Scalia, that the kind of loose-construction approach that Breyer champions “open[s] the door to subjectivity.”⁵³ Well, it does, and the only good answer to Scalia is that textualism or originalism proves in practice to be just as malleable as active liberty. Against the charge of subjectivity Breyer argues mainly that “a judge who emphasizes consequences, no less than any other, is aware of the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect.”⁵⁴ He offers only one example—of course, it is *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*. This singular example is consistent with a reluctance to overrule constitutional decisions. But Breyer’s own practice as a Justice evinces no great reluctance to overrule; “[a]ware of” does not mean “committed to.” He joined *Lawrence v. Texas*,⁵⁵ which overruled *Bowers v. Hardwick*,⁵⁶ and he joined *Roper v. Simmons*,⁵⁷ which overruled

50. *Id.* at 106.

51. 467 U.S. 837 (1984).

52. BREYER, *supra* note 10, at 106.

53. *Id.* at 118.

54. *Id.* at 118–19.

55. 539 U.S. 558 (2003).

56. 478 U.S. 186 (1986).

Stanford v. Kentucky.⁵⁸ *Lawrence* and *Roper*, the first invalidating state statutes that criminalize homosexual sodomy, the second invalidating state statutes that authorize the execution of juvenile murderers, are notably bold “liberal” decisions. Neither decision was based on a consideration of consequences. The sodomy statutes struck down in *Lawrence* had virtually no consequences, since by the time the case was decided the statutes were almost never enforced. They had become little more than a statement of social disapproval of homosexuality, and the Court substituted its own, more “enlightened” moral view—which is fine with me, but not democratic. The psychological studies offered in *Roper* to show that juveniles lack adequate moral maturity to appreciate the significance of murdering someone were misunderstood by the Court.⁵⁹ What the studies actually showed was that there is no inflection point at age 18 at which murderers suddenly discover the moral significance of their acts. The Justices overlooked an empirical literature concerning the incremental deterrent effect of capital punishment.⁶⁰

Defending on consequentialist grounds his dissent in the school voucher case, *Zelman v. Simmons-Harris*,⁶¹ Breyer said that he “saw in the administration of huge grant programs for religious education the potential for religious strife.”⁶² This is a conjecture; and it ignores the fact that, unless a voucher program was permitted to go into effect, we would never be able to verify or falsify the conjecture. We would never learn whether, for example, the provision of additional money for private education (school voucher programs cannot constitutionally be limited to religious schools—that much at least is clear) would stimulate more secular competition for religious schools by providing more money for secular private schools. It is now more than five years since the Supreme Court upheld school vouchers, and there are no signs of the religious strife that Breyer predicted.

Zelman is the answer to someone who might wish to defend Breyer’s casual attitude toward assessing consequences on the ground that speculation is the best a judge can do. One thing the judge can do is allow social experiments to be conducted so that measurable consequences can be observed. Another is to deal responsibly with empirical evidence, as the Court failed to in *Roper*.

57. 543 U.S. 551 (2005).

58. 492 U.S. 361 (1989).

59. Posner, *supra* note 32, at 64–66.

60. *Id.* at 64 n.108 (citing this literature).

61. 536 U.S. 639, 717 (2002).

62. BREYER, *supra* note 10, at 121–22.

To foreclose social experiments adopted by elected legislatures is not only unpragmatic; it is undemocratic. It is true that Breyer votes more often than his conservative colleagues to uphold federal statutes, but his democratic credentials are placed in question by his joining such decisions as *Lawrence* and *Roper*, in which the Court struck down state legislation, and by his dissent in *Zelman*. He is also an enthusiastic citer of foreign constitutional decisions, and that is a form of elitism, for decisions by foreign courts are not events in American democracy. Even when the foreign nation is a democracy, its judges are not appointed or confirmed by elected U.S. officials, as our federal judges are, let alone elected by Americans, as most of our state judges are. And speaking of popular democracy, I think it unlikely that Breyer believes that judges should be elected or that he would support proposals for making it easier to amend the Constitution or for allowing the recall of federal judges by popular vote.

Breyer's methodology for deciding constitutional cases is thus not itself notably democratic, and it is also fuzzy, but this does not trouble him overmuch because he believes that "insistence upon clear rules can exact a high constitutional price."⁶³ He illustrates this contention with the question of whether "three strikes and you're out" laws, which can result in a criminal being sentenced to life even though his third crime was a minor one, such as a theft of golf clubs or videotapes, can be adjudged cruel and unusual punishment.⁶⁴ The Court thought not.⁶⁵ Breyer dissented. He acknowledges in his book that the position he advocated in his dissent "would leave the Court without a clear rule."⁶⁶ And here we get close to the heart of Breyer's strength (at times perhaps weakness) as a Justice. He is not a dogmatist, generating rules from some high-level theory. He is in search of workable results. His opinion in the sentencing guidelines case (*Booker*⁶⁷) was a triumph of ingenuity and political skill in forging a compromise that preserved a sentencing scheme far superior to one that in the name of the Sixth Amendment would give untrammelled sentencing discretion to trial judges whose knowledge of penology is inferior to that of the Sentencing Commission.

But clear rules do have value, and vague standards have drawbacks. I am thinking of Breyer's dissent in *Eldred v. Ashcroft*.⁶⁸ The Court upheld the

63. BREYER, *supra* note 10, at 128.

64. *Id.*

65. *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

66. BREYER, *supra* note 10, at 129.

67. *United States v. Booker*, 125 S. Ct. 738 (2005).

68. 537 U.S. 186 (2003).

constitutionality of the Sonny Bono Copyright Term Extension Act, which extended the copyright term from life plus fifty years to life plus seventy years, against a challenge that the extension violated the Constitution's Copyright and Patent Clause, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for *limited Times to Authors and Inventors* the exclusive Right to their respective Writings and Discoveries."⁶⁹ What concerns me is not the merit of the constitutional challenge but Breyer's suggested standard: A statute extending a copyright term "lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."⁷⁰ This standard leaves up in the air how a judge is to decide whether a copyright term is too long.

Although Breyer is the Justice most knowledgeable about intellectual property in general and copyright in particular, his dissent in *Eldred* attracted no support from his colleagues; Justice Stevens, the other dissenter, did not join Breyer's dissent.⁷¹ Breyer has confessed his inability to persuade his colleagues to his views about economic regulation,⁷² another field in which, like intellectual property, he has greater expert knowledge than his colleagues. He attributes his inability in part to his colleagues' preference for "bright-line rules" in the law, which he thinks difficult to reconcile with economic reasoning because "[e]conomics often concerns gradations, with consequences that flow from a little more or a little less. . . . I tend to disfavor absolute legal lines. Life is normally too complex for absolute rules."⁷³

Justice Breyer is fluent in French. So perhaps he won't take offense if I call him a *bricoleur*, defined by *Wikipedia* as "a person who creates things from scratch, is creative and resourceful: a person who collects information and things and then puts them together in a way that they were not originally designed to do."⁷⁴ The "information and things" that Breyer has assembled to construct an approach to constitutional and statutory interpretation includes

69. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

70. 537 U.S. at 245 (Breyer, J., dissenting).

71. 537 U.S. at 222 (Stevens, J., dissenting).

72. Stephen Breyer, *Economic Reasoning and Judicial Review*, AEI-Brookings Joint Center 2003 Distinguished Lecture 2 (Dec. 4, 2004), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=840>. What is particularly notable about this essay, and very welcome to me, is Breyer's contention that economic reasoning should play a larger, perhaps a dominant, role in decisions involving economic regulation.

73. *Id.* at 6-7.

74. *Bricolage*, in *Wikipedia*, <http://en.wikipedia.org/wiki/Bricolage> (last visited Dec. 7, 2005).

not only Athenian direct democracy and modern American pragmatism, but also Ely's "representation-reinforcing" theory of constitutional adjudication,⁷⁵ Henry Hart's "reasonable legislator" theory of statutory interpretation, Ronald Dworkin's theory (related to Hart's) that constitutional and statutory provisions should be so interpreted as to make them the best possible statements of political morality,⁷⁶ economic analysis, and appropriate deference to the conventional legal materials of precedent and statutory text.⁷⁷ The *bricolage* is as ingenious as it is complex, but the curious consequence of such eclecticism is that it puts the judge in approximately the position he would occupy if he had no constitutional theory. For couldn't Justice Breyer pull a stick out of his bundle to justify any decision that he wanted to reach? It's not as if the sticks have different weights; each is available to tip the balance in a particular case. Breyer has articulated an approach that appears to be loose enough to accommodate any result that a judge might want to reach for reasons the judge might be unwilling to acknowledge publicly, such as a visceral dislike for capital punishment, abortion, affirmative action, or religion.

But the book is so short (barely 40,000 words) and covers so much ground that the possibility cannot be excluded that Breyer has in reserve, as it were, effective responses to the criticisms I have made. Maybe the book is better understood as a manifesto, intended to reach a larger audience than normally attends works of constitutional theory, than as a work of patient scholarship addressed to academic fusspots and nitpickers. The character of the book may also reflect a tension between the way Breyer thinks and judges, on the one hand, and the genre requirements of constitutional theory. He is not a top-down theorist. Active liberty is not a new algorithm for generating "objective" judicial decisions. It is not historically accurate. It is the name he has given to his own, eclectic collection of policy preferences. Whether you agree with his approach is likely to depend on whether you agree with those preferences. This is not said in criticism. It is equally true of Breyer's antagonists, and of his and their predecessors on the Supreme Court stretching back to John Marshall, or for that matter to John Jay.

The idea that conservative Justices do not legislate from the bench is rhetoric rather than reality. It is seductive rhetoric; it may have seduced Justice Breyer, who insists that he doesn't legislate from the bench either, that he is the better originalist because he grasps the democratic character of the

75. See ELY, *supra* note 15.

76. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); ELY, *supra* note 15.

77. Peter Berkowitz, *Democratizing the Constitution*, POL'Y REV., Dec. 2005/Jan. 2006, at 90 (reviewing BREYER, *supra* note 10).

Constitution. At this level, the debate between conservatives like Scalia and liberals like Breyer is a semantic fog. Because of the vagueness of the Constitution's key provisions and the strong emotions that constitutional cases arouse (in part because of the large, well-nigh irreversible consequences of the decisions in some of these cases), Justices are forced back on personal elements, which include ideology as shaped by temperament, experience, and deep-seated beliefs, in deciding how to vote. It has always been thus and always will be. Lawyers will want to read Justice Breyer's engaging book not to find the Holy Grail of constitutional and statutory interpretation but to learn about Breyer's values, about what makes him tick as a Supreme Court Justice, and about how therefore to craft arguments that will have a chance of persuading him.

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CASS R. SUNSTEIN

Justice Breyer's Democratic Pragmatism

*The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many?—fated or free?—material or spiritual?—here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?*¹

A Concise Statement of the Task

In interpreting a statute a court should:

Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; . . .

*It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.*²

I. PRAGMATISM, CONSEQUENCES, AND ACTIVE LIBERTY

As a law professor at Harvard Law School, Stephen Breyer specialized in administrative law. His important work in that field was marked above all by its unmistakably pragmatic foundations.³ In an influential book, Breyer emphasized that regulatory problems were “mismatched” to regulatory tools;

1. WILLIAM JAMES, *What Pragmatism Means*, in PRAGMATISM 43, 45 (1907).

2. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374, 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (outline formatting omitted).

3. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

he urged that an understanding of the particular problem that justified regulation would help in the selection of the right tool.⁴ One of Breyer's major innovations lay in an insistence on evaluating traditional doctrines not in a vacuum, but in light of the concrete effects of regulation on the real world.⁵ Hence Breyer argued for a close connection between administrative law and regulatory policy.⁶ Continuing his pragmatic orientation, he also emphasized the importance of better priority-setting in regulation—of finding mechanisms to ensure that resources are devoted to large problems rather than small ones.⁷

While some of Breyer's work touched on the separation of powers,⁸ constitutional law was not his field. But as a member of the Supreme Court, Breyer has slowly been developing a distinctive approach of his own, one that also has a pragmatic dimension, and that can be seen as directly responsive to his colleague, Justice Antonin Scalia, and to Scalia's embrace of "originalism": the view that the Constitution should be interpreted to mean what it originally meant.⁹

A. Three Claims

This book announces and develops Breyer's theory. Its most distinctive feature is its effort to connect three seemingly disparate claims. The first is an insistence that judicial review can and should be undertaken with close reference to active liberty and to democratic goals, a point with clear links to the work of John Hart Ely.¹⁰ The second is an emphasis on the centrality of "purposes" to legal interpretation, a point rooted in the great legal process materials of Henry Hart and Albert Sacks and, in particular, their brilliant note on statutory interpretation.¹¹ The third is a claim about the need to evaluate theories of legal interpretation with close reference to their consequences, a

4. See *id.* at 191.

5. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); BREYER, *supra* note 3.

6. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (5th ed. 2002). Full disclosure: I am among the "al." now working on the book, and hence Breyer and I are, in a formal sense, coauthors. But Breyer, otherwise occupied, has not worked on the book since I have joined it.

7. See BREYER, *supra* note 5, at 10-11.

8. See, e.g., Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984).

9. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

10. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

11. See HART & SACKS, *supra* note 2, at 1374-80.

point whose foundations can be found in American pragmatism. In Breyer's view, any theory of interpretation must be assessed by taking close account of its actual effects.

Much of the interest and originality of Breyer's book lies in its brisk but ambitious effort to integrate these three claims. In my view, Breyer is right to see a connection between self-government and constitutional interpretation, and also to emphasize that a theory of interpretation must be attentive to its consequences. No such theory can be evaluated or defended without reference to its effects. In addition, Breyer argues convincingly for an approach to constitutional law that generally respects democratic prerogatives and also embodies a form of modesty, in the form of narrow rulings on the most difficult questions. But I shall raise two sets of questions about his analysis.

The first set involves the difficulties of purposivism. Those who emphasize active liberty and democratic self-government might well reject Breyer's purposive approach to interpretation, including Breyer's purposive reading of the Constitution. They might embrace textualism on the ground that text represents the best evidence of the public's will; they might prefer canons of construction; they might even embrace the view, associated with James Bradley Thayer, that courts should uphold legislation unless it is clearly beyond constitutional bounds.¹² The second set of questions involves the possibility that consequentialism, properly understood, might lead in directions that Breyer rejects. Those who believe in the importance of consequences might well be drawn to an approach very different from Breyer's. If consequences matter, textualism and Thayerism are not off the table.

Breyer's specific conclusions are unfailingly reasonable; the question is whether his general commitments are enough to justify those conclusions. I shall suggest that they are not. Breyer is correct to reject originalism in constitutional law, and in that domain his own approach, embracing both minimalism and restraint, has a great deal to offer. But it must be developed in a way that devotes more care to the problem of judicial fallibility, and I shall offer some notes on how the theory might be so developed. In the end, I suggest that while purposivism has its uses, Breyer underrates the arguments for starting with the text, and undervalues the role of canons of construction in statutory interpretation.

12. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)

B. Theory and Practice

Breyer's organizing theme is "active liberty," which he associates with the right of self-governance. It is noteworthy that in his own judicial work, Breyer is plausibly seen as the most consistently democratic member of the Rehnquist Court: Among its nine members, he had the highest percentage of votes to uphold acts of Congress¹³ and also to defer to the decisions of the executive branch.¹⁴ And indeed, a great deal of his book is a plea for judicial caution and deference.¹⁵ But Breyer does not mean to say that courts should uphold legislation whenever the Constitution is unclear.¹⁶ Like Ely, Breyer does not rule out the view that courts should take an aggressive role in some areas, above all in order to protect democratic governance.¹⁷

His short book comes in three parts. The first builds on Benjamin Constant's famous distinction between the liberty of the ancients and the liberty of the moderns.¹⁸ The liberty of the ancients involves "active liberty" — the right to share in the exercise of sovereign power. Quoting Constant, Breyer refers to the hope that the sharing of that power would "ennoble[]" the people's "thoughts [and] establish[] among them a kind of intellectual equality which forms the glory and the power of a people."¹⁹ But Constant also prized negative liberty, meaning individual "independence" from government authority.²⁰ As Breyer describes Constant's view, which he firmly endorses, it is necessary to have both forms of freedom, and thus "to combine the two together."²¹

Breyer believes that the Framers of the Constitution did exactly that. His special emphasis is on what Constant called "an active and constant

13. Lori A. Ringhand, *Judicial Activism and the Rehnquist Court* (Sept. 7, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=765445>.

14. See Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. (forthcoming 2006).

15. Thus, for example, Breyer favors a deferential approach to campaign finance restrictions and affirmative action programs. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 48-49, 82-83 (2005). He also makes a plea for judicial caution in the domain of privacy. *Id.* at 66-74.

16. This position is defended in Thayer, *supra* note 12.

17. BREYER, *supra* note 15, at 11-12.

18. *Id.* at 3-7. The best discussion remains STEPHEN HOLMES, *BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM* (1984).

19. BREYER, *supra* note 15, at 4.

20. *Id.* at 5.

21. *Id.* at 5. It is not clear that this is, in fact, an adequate account of Constant's view.

participation in public power.”²² That form of participation includes voting, town meetings, and the like; but it also requires that citizens receive information and education to develop their capacity for effective self-governance. In Breyer’s view, the citizens of post-Revolutionary America insisted on highly democratic forms of state government, promoting popular control. Breyer is aware of the highly ambivalent experiences of post-Revolutionary governments; he knows that some commentators have rejected the view that the Constitution is a democratic document.²³ Nonetheless, he believes that the Framers of the Constitution accepted the deepest aspirations of the American Revolution, creating a framework with a basically “democratic objective.”²⁴

In Breyer’s account, the Warren Court appreciated active liberty and it attempted to make that form of liberty more real for all Americans.²⁵ By contrast, the Rehnquist Court may have pushed the pendulum “too far” back in the other direction.²⁶ In short, Breyer believes that an appreciation of active liberty has concrete implications for a wide range of modern disputes.

The second part of his book traces those implications. He begins with free speech. An obvious question is whether the Court should be hostile or receptive to campaign finance reform. With his eye directly on the democratic ball, Breyer suggests that if we focus on the “the Constitution’s general democratic objective . . . ‘participatory self-government,’”²⁷ then we will be receptive to restrictions on campaign contributions. A central reason is that such restrictions “seek to democratize the influence that money can bring to bear upon the electoral process.”²⁸ In the same vein, Breyer insists that the free speech principle, seen in terms of active liberty, gives special protection to political speech, and significantly less protection to commercial advertising. He criticizes his colleagues on the Court for protecting advertising with the aggressiveness that they have shown in recent years. His purposive

22. *Id.* at 4; see also Frank I. Michelman, *Politics and Values or What’s Really Wrong with Ratinoality Review*, 13 CREIGHTON L. REV. 487 (1979) (discussing the ideal of active liberty, in the form of engagement in public affairs).

23. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

24. BREYER, *supra* note 15, at 9.

25. *Id.* at 11.

26. *Id.*

27. *Id.* at 46.

28. *Id.* at 47.

interpretation of freedom of speech thus emphasizes democratic self-government above all.²⁹

Affirmative action might seem to have little to do with active liberty. At first glance, it poses a conflict between the ideal of color-blindness and what Breyer calls a “narrowly purposive”³⁰ understanding of the Equal Protection Clause, one that emphasizes the historical mistreatment of African-Americans. Directly disagreeing with some of his colleagues,³¹ Breyer endorses the narrowly purposive approach. But he also contends that in permitting affirmative action at educational institutions, the Court has been centrally concerned with democratic self-government. The reason, pragmatic in character, is that “some form of affirmative action” is “necessary to maintain a well-functioning participatory democracy.”³² Breyer points to the Court’s emphasis on the role of broad access to education in “sustaining our political and cultural heritage” and in promoting diverse leadership.³³ In Breyer’s view, it should be no surprise that the Court selected an interpretation of the Equal Protection Clause that would, as a pragmatic matter, promote rather than undermine the operation of democracy. In short, a serious problem with the attack on affirmative action is that it would produce intolerable consequences.

With respect to privacy, Breyer’s emphasis is on the novelty of new technologies and the rise of unanticipated questions about how to balance law enforcement needs against the interest in keeping personal information private. Because of the difficulty of those problems, Breyer argues, on pragmatic grounds, for “a special degree of judicial modesty and caution.”³⁴ Hence his plea is for narrow, cautious judicial rulings that do not lay out long-term solutions. In Breyer’s view, such rulings serve active liberty, because a narrow ruling is unlikely to “interfere with any ongoing democratic policy debate.”³⁵ His argument here is important because other members of the Court, most notably Scalia, have objected to narrow rulings on the ground that they leave too much uncertainty for the future.³⁶

29. In this way he seems to follow ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (photo. reprint 2000) (1948). CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993), is in the same general vein.

30. BREYER, *supra* note 15, at 80.

31. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part).

32. BREYER, *supra* note 15, at 82.

33. *Id.* (quoting *Grutter*, 539 U.S. at 330-31).

34. *Id.* at 71.

35. *Id.* at 73.

36. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

Some of the most noteworthy decisions of the Rehnquist Court attempted to limit the power of Congress.³⁷ For example, the Court struck down the Violence Against Women Act as beyond congressional authority under the Commerce Clause.³⁸ It also announced an “anti-commandeering” principle, one that forbids the national government from requiring state legislatures to enact laws.³⁹ In the abstract, those decisions seem to promote active liberty, because they decrease the authority of the more remote national government, and because they promote participation and self-government at the local level. Breyer is no critic of federalism or defender of centralized government. Nonetheless, he strongly objects to the Court’s recent federalism decisions. Breyer’s special target is the anti-commandeering principle. Speaking in heavily pragmatic terms, Breyer thinks that this prohibition prevents valuable national initiatives to protect against terrorism, environmental degradation, and natural disasters—initiatives in which, for example, the national government requires state officials to ensure compliance with federal standards.⁴⁰

Breyer also contends that an understanding of active liberty can inform more technical debates. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴¹ for example, the Court announced a principle of deference to administrative interpretations of law. The Court ruled that in the face of statutory ambiguity, courts should defer to agency interpretations so long as they are reasonable. Breyer believes that this approach is too simple and too crude, in a way that disserves democracy itself.⁴² When the agency has solved an interstitial question, Breyer believes that judicial deference is appropriate, because deference is what a reasonable legislature would want. But on “question[s] of national importance,”⁴³ involving the fundamental reach or nature of the statute, Breyer thinks that a reasonable legislature would not want courts to accept the agency’s interpretation. He thus urges that courts should take a firmer hand in reviewing agency judgments on fundamental matters than in reviewing more routine matters. Here too he opposes Justice

37. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000).

38. *Id.*

39. *New York v. United States*, 505 U.S. 144 (1992).

40. BREYER, *supra* note 15, at 59–61.

41. 467 U.S. 837 (1984).

42. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. (forthcoming 2006).

43. BREYER, *supra* note 15, at 107.

Scalia, who endorses a broad reading of *Chevron*, one that would generally defer to agency interpretations of law.⁴⁴

There is a larger interpretive question in the background. Should courts rely only on a statute's literal text, or should they place an emphasis instead on statutory purpose and congressional intent? Sharply disagreeing with the more textually oriented Scalia,⁴⁵ and again emphasizing pragmatic considerations, Breyer favors purpose and intent. Here he is evidently influenced by the famous legal process materials, compiled by Henry Hart and Albert Sacks. As I have noted, those materials place "purpose" front and center, and they also insist that courts should assume that legislators are "reasonable persons pursuing reasonable purposes reasonably."⁴⁶ In the same vein, Breyer emphasizes that a purposive approach asks courts to consider the goals of "the 'reasonable Member of Congress'—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem."⁴⁷

In defending this approach, Breyer speaks in thoroughly pragmatic terms, emphasizing the beneficial consequences of purposivism. Breyer thinks that, as compared with a single-minded focus on literal text, his approach will tend to make the law more sensible, almost by definition. He also contends that it "helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."⁴⁸ Breyer concludes that an emphasis on legislative purpose "means that laws will work better for the people they are presently meant to affect. Law is tied to life, and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit."⁴⁹ Thus, Breyer directly links active liberty, purposive approaches to law, and an emphasis on consequences.

The third part of Breyer's book tackles the broadest questions of interpretive theory and directly engages Scalia's contrary view. Breyer emphasizes that he means to draw attention to purposes and consequences above all. Constitutional provisions, he thinks, have "certain basic purposes,"⁵⁰ and they should be understood in light of those purposes and the broader democratic goals that infuse the Constitution as a whole. In addition,

44. See *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

45. See SCALIA, *supra* note 9.

46. See HART & SACKS, *supra* note 2, at 1378.

47. BREYER, *supra* note 15, at 88. See the powerful note emphasizing this point and what the authors saw as the centrality of purpose, in HART & SACKS, *supra* note 2, at 1374-80.

48. BREYER, *supra* note 15, at 99.

49. *Id.* at 100.

50. *Id.* at 115.

consequences are “an important yardstick to measure a given interpretation’s faithfulness to these democratic purposes.”⁵¹ Breyer is fully aware that many people, including his colleagues Scalia and Thomas, are drawn to “textualism” and its close cousin “originalism”—approaches that favor close attention to the meaning of legal terms at the time they were enacted. Scalia, Thomas, and their followers are likely to think that Breyer’s approach is an invitation for open-ended judicial lawmaking in a way that compromises his own democratic aspirations.⁵² But he offers several responses.

First, originalist judges claim to follow history, but they cannot easily demonstrate that history in fact favors their preferred method. The Constitution does not say that it should be interpreted to mean what it meant when it was ratified. The document itself enshrines no particular theory of interpretation; it does not mandate originalism. And if originalism cannot be defended by reference to the intentions and understandings of the Framers, Breyer asks, in what way can it be defended—“other than in an appeal to *consequences*?”⁵³ He points out that the most sophisticated originalists ultimately argue that their approach will have good consequences—by, for example, stabilizing the law and deterring judges from imposing their own views. Even Breyer’s originalist adversaries are “consequentialist in this important sense.”⁵⁴ They are not consequentialists in particular cases, but they adopt, and defend, their preferred approach on consequentialist grounds.⁵⁵

Breyer’s second argument is that his own approach does not leave courts at sea, for he, too, insists that judges must take account of “the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect.”⁵⁶ Those who focus on consequences will not favor frequent or dramatic legal change, simply because stability is important. In any case, textualism and originalism cannot avoid the problem of judicial discretion. “Which historical account shall we use? Which tradition shall we apply?”⁵⁷ In the end, Breyer

51. *Id.*

52. See SCALIA, *supra* note 9.

53. BREYER, *supra* note 15, at 118.

54. *Id.*

55. See *id.*; see also RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); Posting of Randy Barnett to Legal Affairs Debate Club, http://legalaffairs.org/webexclusive/debateclub_cie0505.msp#Tuesday (May 3, 2005, 13:43 EST) (“Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”).

56. BREYER, *supra* note 15, at 118–19.

57. *Id.* at 127.

contends that the real problem with textualism and originalism is that they “may themselves produce seriously harmful consequences—outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches.”⁵⁸ His pragmatic goal is to “help Americans remain true to the past while better resolving their contemporary problems of government through law,”⁵⁹ and he believes that his kind of purposive approach, rooted in active liberty, is most likely to promote that goal.

II. DEMOCRACY AND INTERPRETATION

This is a brisk, lucid, and energetic book, written with conviction and offering a central argument that is at once provocative and appealing. It is unusual for a member of the Supreme Court to attempt to set out a general approach to his job; Breyer’s effort must be ranked among the most impressive such efforts in the nation’s long history. His attack on originalism is powerful and convincing. And in defending a pragmatic, purposive-oriented alternative, Breyer writes in a way that is unfailingly civil and generous to those who disagree with him, providing a model for how respectful argument might occur, even in a domain that is intensely polarized.

But there are two general problems with his approach. The first stems from the difficulty of characterizing purposes. Texts rarely announce their own purposes; the same is true of the Constitution itself. When Breyer asks judges to identify the purposes of reasonable legislators, he is inviting a degree of judicial discretion in the judgment of what purposes are reasonable. The second problem involves consequences, viewed through the lens of active liberty. It is possible both to use active liberty as the basis for evaluating consequences and to think that courts do best if they follow the ordinary meaning of statutory texts, or defer to agency interpretations on the most important questions, or uphold legislation unless it is plainly unconstitutional. Many different approaches, not only Breyer’s, can march under the pragmatic banner.⁶⁰

Breyer’s own approach requires supplemental assumptions, involving not only active liberty but a degree of confidence in judicial capacities, and therefore a willingness to use standards rather than rules in the domain of

58. *Id.* at 129.

59. *Id.* at 111.

60. See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (forthcoming 2006) (manuscript at 254, on file with author) (defending a form of Thayerism on pragmatic grounds); Scalia, *supra* note 9 (making pragmatic arguments on behalf of originalism).

judicial interpretation.⁶¹ I believe that in constitutional law, Breyer often points in the right directions. He does so by emphasizing the value of judicial deference to democratic judgments;⁶² by showing some enthusiasm for judicial minimalism, in the form of narrow decisions that leave the hardest questions undecided;⁶³ and by suggesting that a stronger judicial role is most defensible when democratic processes are functioning poorly.⁶⁴ For statutes, however, an emphasis on text, rather than purpose, is the right place to start; Breyer gives too little attention to the strongest arguments for textualism. In addition, the best theory of statutory interpretation would give less attention to purpose and more attention to applicable canons of construction, including those canons that counsel avoidance of constitutional questions and deference to the views of administrative agencies.

A. *Originalism and Consequences*

Breyer's most general claim is that any approach to legal interpretation must be defended in a way that pays close attention to its consequences. Despite its simplicity, this pragmatic point continues to be widely ignored. It has particular implications for the analysis of originalism. One of the strengths of Breyer's book is his brief but powerful criticism of that approach to constitutional law.

There is a lively historical dispute about whether those who ratified the Constitution meant to hold posterity to their specific views.⁶⁵ If the ratifiers did not want to bind posterity to their particular understandings, originalism stands defeated on its own premises: The original understanding may have been that the original understanding is not binding. Breyer properly notes this possibility.⁶⁶ But suppose that the ratifiers had no clear view on that question, or even that the better understanding is that they did, in fact, want to hold

61. In fact, many of the disagreements between Breyer and Scalia involve a debate over standards versus rules, with Breyer typically opting for standards and Scalia for rules. See, e.g., Sunstein, *supra* note 42.

62. See, for example, Breyer's treatment of commercial advertising, BREYER, *supra* note 15, at 50-55.

63. See *id.* at 66-74.

64. See *id.* at 11.

65. See, e.g., Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

66. BREYER, *supra* note 15, at 117.

posterity to their understandings.⁶⁷ Even if so, it is up to us, and not to them, to decide whether to follow those views. It would be circular and therefore unhelpful to defend reliance on the ratifiers' specific views on the ground that the ratifiers wanted us to respect their specific views.

Breyer is therefore right to suggest that originalism requires some justification in nonhistorical terms; and consequences are surely relevant to any such effort at justification.⁶⁸ Suppose that the consequence of originalism would be to threaten many contemporary rights and understandings. If so, why should we accept it?⁶⁹ Originalism would authorize states to discriminate on the basis of sex, which the Equal Protection Clause was not originally understood to forbid. Originalism might well mean that *Brown v. Board of Education* was wrongly decided;⁷⁰ it would probably mean that the national government could discriminate on the basis of race and sex, because the Equal Protection Clause applies only to the states. Many originalists firmly believe that their approach would require courts to invalidate a great deal of legislation—by, for example, striking down independent regulatory agencies,⁷¹ forbidding Congress to delegate broad discretion to regulatory agencies,⁷² and imposing new limitations on national power under the Commerce Clause.⁷³

67. See Nelson, *supra* note 65.

68. Of course any evaluation of consequences must be value-laden, a point taken up below. See *infra* Section II.C.

69. See generally Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (discussing originalism).

70. The reason is that it is not easy to find, in the Fourteenth Amendment, a specific understanding that any relevant clause banned segregation. See John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 460-62 (discussing the variety of views of segregation in the Reconstruction era); see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 123-25 (1977) (noting support for segregation among framers of the Fourteenth Amendment); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11-56 (1955). For a counterargument, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). McConnell impressively shows that many members of Congress believed that under Section 5 of the Fourteenth Amendment, Congress had the authority to abolish segregation. But it is one thing to say that many members of Congress so believed, but never enacted legislation to that effect; it is quite another thing to say that the Fourteenth Amendment was understood to create a self-executing, judicially enforceable ban on segregation.

71. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

72. See, e.g., Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 FED. COMM. L.J. 427 (2001).

73. See, e.g., *Gonzales v. Raich*, 125 S.Ct. 2195, 2229 (2005) (Thomas, J., dissenting); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESERVATION OF LIBERTY* 274-318

Originalism would likely eliminate the right of privacy altogether, simply because there is no such right in the document, and it is hard to show that the original understanding of any relevant provision supports the privacy right.

I do not insist that the originalist method necessarily compels all of these conclusions. And even if originalism does have these consequences, some originalists candidly acknowledge that established precedent has its claims, and that it must sometimes be respected even if it deviates from the original understanding. Justice Scalia, for example, says that he might well be a “faint-hearted” originalist⁷⁴ because he is willing to follow precedent even when he believes that it is wrong in principle.⁷⁵ My only point is that Breyer is entirely correct to note that the document itself does not require originalism, to argue that consequences matter to the choice of a theory of interpretation, and to insist that if we care about consequences, the argument for originalism does not look very plausible.⁷⁶

B. Second-Order Pragmatism? Purposes and Fallible Judges

Breyer generally favors purposive approaches to legal texts. But he says too little about the difficulties that judges face in describing purposes. We can describe this as a pragmatic objection to his approach—an objection that might argue in favor of second-order pragmatism, that is, a form of pragmatism that rejects an inquiry into purpose, or any case-by-case approach, because it is alert to judicial fallibility.⁷⁷ If the inquiry into purposes produces indeterminacy, bias, or error, the argument for purposivism is undermined. Gertrude Stein’s famous complaint about Oakland—“there is no there there”⁷⁸—may also be true of legislative purposes. Let us begin with some technical issues.

(2004); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Douglas H. Ginsburg, *On Constitutionalism*, 2002-2003 CATO SUP. CT. REV. 7.

74. Scalia, *supra* note 9, at 864.

75. Scalia has been quoted as saying that Thomas “does not believe in *stare decisis*, period.” Scalia explained, “If a constitutional line of authority is wrong, [Thomas] would say let’s get it right. I wouldn’t do that.” See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 281-82 (2004).

76. There are other problems, including the arguable incoherence of the originalist enterprise. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 68-71 (2005).

77. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

78. GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 239 (1937), available at <http://www.bartleby.com/73/148.html>.

Recall that Breyer argues against a broad reading of *Chevron*; he believes that for major questions courts should make an independent assessment of statutory meaning, and not defer to reasonable interpretations by the executive branch. But why? His answer appears to be that reasonable legislators would want courts to assume an independent role.⁷⁹ But is this so clear? Assume that a statute—say, the Endangered Species Act, or the Food and Drug Act—contains an ambiguous provision on an issue of national importance. Might not reasonable legislators want a specialized, accountable agency to resolve the ambiguity, even on major questions? Resolution of statutory ambiguities often calls for a difficult policy judgment, and reasonable legislatures might not want difficult policy judgments to be made by federal courts.⁸⁰

On consequentialist grounds, consider the following fact: In reviewing agency interpretations of law, Republican appointees to the federal bench show a definite tilt in a conservative direction, and Democratic appointees show a definite tilt in a liberal direction.⁸¹ Is it so clear that a reasonable legislator would want statutory ambiguities to be resolved in accordance with whatever tilt can be found on the relevant reviewing court? Or consider an additional fact: A more refined approach to *Chevron*, of the sort that Breyer celebrates, has produced a great deal of confusion in the lower courts.⁸² Does pragmatism support that outcome?

In short, it is not clear that in this context Breyer has properly identified the (hypothetical, constructed) instructions of a reasonable legislator. But the important point is far more general. In interpreting statutes, Breyer follows Hart and Sacks in arguing in favor of close attention to purposes, understood as the objectives of a “reasonable legislator.” Sometimes this approach is indeed useful, especially when there is a consensus on what reasonableness requires.⁸³ But Hart and Sacks, writing in the complacent, consensus-pervaded legal culture of the 1950s, downplayed the possibility that disagreement, highly ideological in nature, would break out on that question. After the 1960s, when the ideological disagreements became omnipresent in the legal culture, the purposive approach favored by Hart and Sacks came under severe pressure. In

79. BREYER, *supra* note 15, at 106.

80. This argument is spelled out in some detail in Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Interpret the Law*, 115 YALE L.J. (forthcoming 2006).

81. *See id.*; Sunstein, *supra* note 14.

82. *See* Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003); Lisa Schultze Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2006).

83. Examples are given in Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-61 (1992).

my view, the appeal of textualism is best understood as a product of the post-1960s awareness that the search for purposes is often driven by value judgments of one or another kind, and a belief that those judgments ought not to be made by unelected judges.⁸⁴

In the current period, it should be obvious that different judges may well disagree about what a reasonable legislator would like to do. Imagine that a law condemns "discrimination on the basis of sex," and suppose that a state adopts a height and weight requirement for police officers, one that excludes far more women than men. In deciding whether this requirement is "discrimination," how shall judges characterize the purpose of a reasonable legislator? It is inevitable that courts will see their own preferred view as reasonable. Does that promote active liberty? Does pragmatism support a situation in which judges assess reasonableness by their own lights?

Unfortunately, the problem is common. Suppose that a statute imposes special punishment on those who "carry" a firearm in relation to a drug offense; does someone "carry" a firearm when he drives a car with a firearm in the glove compartment? Writing for the Court, Justice Breyer said "yes," emphasizing what he saw as the legislature's reasonable purpose—which, in his view, would make it senseless to distinguish between a firearm "carried" in a car and a firearm "carried" by hand in a bag.⁸⁵ But perhaps the legislature's reasonable purpose was to punish the unique dangers that come from a situation in which a firearm is "carried" (literally?) on the person. If so, a purposive definition of "carry" would not include transportation via automobile.

The general points are that laws rarely come with clear announcements of their purposes and that in hard cases any characterization requires some kind of evaluative judgment from courts. In such cases, purposive interpretation is not a matter of finding something; there is no "there" to find there. Suppose that an antidiscrimination statute is invoked against affirmative action programs.⁸⁶ Does the purpose of the ban on "discrimination" argue for, or against, such programs? It would be easy to characterize the purpose as the elimination of any consideration of race from the relevant domain; it would also be easy to characterize the purpose as the protection of traditionally disadvantaged groups.⁸⁷ If judges are asked to say what "reasonable" legislators

84. See SCALIA, *supra* note 9, at 16–18.

85. *Muscarello v. United States*, 524 U.S. 125, 132–33 (1998).

86. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

87. See RONALD DWORKIN, *How To Read the Civil Rights Act*, in *A MATTER OF PRINCIPLE* 316 (1985).

would like to do, they are all too likely to say what they themselves would like to do.

Hart and Sacks, Breyer's predecessors, offer a powerful and largely sensible approach to statutory interpretation, but they devote too little attention to the problem of characterizing purpose. When courts choose one purpose over another (reasonable) candidate, they are actually attempting to put the relevant text in the best constructive light.⁸⁸ Of course they are selecting an interpretation that fits the text and context; if they were not doing that, they would not be engaging in interpretation at all. But when they select a reasonable purpose, they are choosing an approach that, by their own lights, makes the best sense. A judicial judgment on this count is hardly untethered—that would be a caricature—but it is a judicial judgment nonetheless.

Many textualists distrust the resort to purposes for this very reason. They want courts to hew closely to statutory language.⁸⁹ They think that judges have used common law approaches, including analogical reasoning, in domains where they do not belong.⁹⁰ And, indeed, the Hart and Sacks materials might well be understood as a product of an early confrontation between common law thinking and a system of law that is pervaded by statutory interventions. It is also possible to argue that an emphasis on the plain meaning of the text—which is what, after all, has been enacted—promotes democratic responsibility and also disciplines the judiciary by reducing the risk that judges will infuse texts with purposes of their own.

If purpose is being characterized in a way that defies the ordinary meaning of the text, these arguments for textualism have considerable pragmatic force. Indeed, textualism might easily be defended with reference to active liberty, and in two different ways. First, textualism promotes democratic government, by encouraging the legislature to make its instructions clear. Over time, a text-oriented judiciary might even promote more clarity and better accountability from legislatures, simply because legislators will know that text will be what matters. Second, textualism constrains judicial creation of “intentions” and “purposes” to push statutes in judicially preferred directions.⁹¹ Suppose that

88. See RONALD DWORKIN, *LAW'S EMPIRE* 229 (1986).

89. See SCALIA, *supra* note 9, at 23-25.

90. *Id.* at 3-9.

91. Note in this regard the very different reaction of German and Italian judges to the emergence of fascism. German judges proceeded in a purposive fashion, abandoning text in favor of legislative goals (and consequences!), in a way that promoted injustice and even atrocity. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 80-81 (Deborah Lucas Schneider trans., 1991). By contrast, the Italian judges paid close attention to text and to plain meaning in a way that produced much better consequences. See Guido

when judges identify intentions or purposes, they are sometimes making their own evaluative judgments, and not following legislative will. If so, those concerned with active liberty, seeking to minimize the discretion of unelected judges, might want courts to follow text and to minimize the role of intentions and purposes.

To be sure, it is easy to overstate the constraints imposed by text, and this is a strong point for Breyer. When the text is ambiguous, or leaves gaps, textualism by hypothesis is inadequate, and some other interpretive tool must be invoked.⁹² There is a serious risk that in hard cases, preferences are likely to matter for textualists as for everyone else.⁹³ My only suggestion is that Breyer pays too little attention to the risk that any judgments about reasonableness will be the judges' own, in a way that disserves democracy itself.

Breyer is correct to say that any theory of interpretation has to be defended in terms of its consequences. But for interpreting statutes, it is not at all clear that a purposive approach, focusing on consequences in particular cases, is preferable to a text-based approach, one that asks judges to think little or not at all about consequences. A textual approach might be simpler to apply; if so, that is surely a point in its favor. And if judges cannot reliably identify reasonable purposes, textualism might also lead to better results, or consequences, all things considered.⁹⁴ Much depends on the capacities of judges; much also depends on whether the legislature would behave differently, and better, if a textualist approach is followed.⁹⁵

None of this means that Scalia's approach is necessarily superior to Breyer's. But it does point out the necessity of engaging the possibility that on his own consequentialist grounds, and with an eye firmly on democratic goals,

Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479, 482 (2000) ("To the scholars opposing Fascism, the nineteenth-century self-contained formalistic system became a great weapon. . . . What it conserved was the liberal, nineteenth-century political approach . . . [and] in a time of Fascism, the important thing was that it conserved basic democratic attitudes.").

92. Consider, for example, the rule of lenity, invoked in *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).

93. Evidence can be found in Sunstein, *supra* note 80; and Sunstein, *supra* note 14.

94. Some people appear to believe that interpretation, to count as such, necessarily calls for attention to the intent of those who wrote the text in question. See, e.g., Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 630-32 (2005). This is a blunder. In law, it is certainly possible to interpret texts by pointing to the ordinary meaning of the words, without speculating about authorial intentions. Whether this is desirable as well as possible is another question, one that must be resolved by reference, among other things, to consequences.

95. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

textualism in the interpretation of ordinary statutes might be preferable to an approach that explores purposes.⁹⁶ To be sure, textualism is sometimes a fake, as when the text does not have any clear meaning. In my view, hard cases, in which the text is indeterminate, are best resolved with clear reference to the views of any applicable administrative agency and also with close attention to pertinent canons of construction. Breyer spends far too little time on such canons,⁹⁷ which play a pervasive role in statutory interpretation, even when they are not explicitly identified. Any court will inevitably interpret statutes against background understandings, some but not all of which will be reduced to canons. Properly used, such canons discipline the exercise of judicial discretion and also serve the system of separated powers.⁹⁸

A simple example is the idea that statutes will not lightly be taken to raise serious constitutional problems. This canon serves to ensure that the legislature, and not merely the executive, will authorize intrusions on constitutionally sensitive interests⁹⁹—an important idea that has nothing to do with legislative purposes. As another example, consider the notion that unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear.¹⁰⁰ Because retroactivity is disfavored in the law,¹⁰¹ statutes will be construed to apply prospectively unless Congress has specifically said otherwise. Or consider the presumption against applying statutes outside of the territory of the United States.¹⁰² If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect. Canons of this general sort, implicit or explicit, play an important role in statutory interpretation, and they often discipline judicial judgment, more so than does resort to a judicially constructed purpose.

But this is not the place to defend a particular approach to statutory interpretation. The only point is that Breyer has not shown that a purposive approach is unambiguously preferable to the reasonable alternatives.

96. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

97. BREYER, *supra* note 15, at 98–99.

98. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

99. See, e.g., Sunstein, *supra* note 80.

100. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

101. *Id.*

102. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

C. Active Liberty as an Interpretive Tool

Breyer is right to say that the Framers wanted to recognize both active liberty and negative liberty. But the Framers saw themselves as republicans, not as democrats,¹⁰³ and they did not believe in participatory democracy or in rule through town meetings. On this count, Breyer slides quickly over intense debates about what the American Framers actually sought to do.¹⁰⁴ Of course, they attempted to provide a framework for a form of self-government.¹⁰⁵ But so stated, that goal operates at an exceedingly high level of abstraction, one that cannot easily be brought to bear on concrete cases. Much of the time, it is hard to link the general idea of self-government to particular judgments about contemporary disputes in constitutional law.

Certainly Breyer does not try to argue, in originalist fashion, that the actual drafters and ratifiers of the relevant constitutional provisions wanted to allow campaign finance reform, restrictions on commercial advertising, affirmative action programs, and federal commandeering of state government. He argues instead that the idea of active liberty, which animates the Constitution, helps to justify these judgments. This is not unreasonable. But exactly what kind of argument is it? The Framers of the Constitution also placed a high premium on "domestic tranquility," to which the preamble explicitly refers. Would it be right to say that because domestic tranquility is a central goal of the document, the President is permitted to ban dangerous speech—or that because, or if, affirmative action threatens to divide the races, in a way that compromises "tranquility," color-blindness is the right principle after all?

In any case, Breyer rightly emphasizes that the Constitution attempts to protect negative liberty too. Why shouldn't a ban on campaign finance restrictions be seen to run afoul of that goal? Nor is negative liberty the only value at stake. Such restrictions forbid people from spending their money on political campaigns, in a way that might well be taken to compromise participatory self-government. In this light, we could see campaign finance restrictions as offending, at once, both negative and active liberty. Deductive logic cannot take us from an acknowledgement of the importance of active

103. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985).

104. See JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT* (1994); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1997); WOOD, *supra* note 103.

105. See WOOD, *supra* note 103, at 10-45.

liberty to an acceptance of campaign finance restrictions; there are no syllogisms here. Instead, an evaluative judgment must be made to the effect that, properly characterized, the First Amendment and its goal of self-government do not condemn (the relevant) restrictions on campaign contributions and expenditures. I believe that for many such restrictions, this conclusion is broadly correct, especially when we consider the general need for courts to defer to congressional judgments in hard cases.¹⁰⁶ But the evaluative judgment is inescapable.

Or suppose that we accept Breyer's claims about the centrality of active liberty to the constitutional design. Is originalism therefore off the table? Perhaps not. We might believe, with some constitutional theorists (including Alexander Hamilton¹⁰⁷), that constitutional provisions, as products of an engaged citizenry, reflect the will of "We the People" as ordinary legislation usually does not. If so, an emphasis on the original understanding can be taken to serve active liberty at the same time that it promotes negative liberty. It serves active liberty because it follows the specific judgments of an engaged citizenry. It promotes negative liberty because, and precisely to the extent that, those judgments favor negative liberty (or for that matter active liberty). I do not suggest that this argument is convincing. The Framers and ratifiers included only a small segment of early America, and in any case the fact that the Framers and ratifiers are long dead creates serious problems for those who argue for originalism in democracy's name. The only point is that Breyer's emphasis on active liberty does not rule originalism out of bounds.

Or return to Thayer's claim that the Court should strike down legislation only if it clearly and unambiguously violates the Constitution. Despite his general enthusiasm for restraint, Breyer does not mean to follow Thayer. But why not? Thayer and his followers can claim to promote active liberty because they allow the sovereign people to do as they choose. Indeed, Learned Hand, an apostle of judicial restraint, wanted courts to be reluctant to invalidate legislation in large part because he was committed to democratic self-rule.¹⁰⁸ Perhaps Breyer thinks that this approach undervalues both negative and active liberty, which majority rule might compromise. But is this so clear? Perhaps a

¹⁰⁶. An obvious qualification involves incumbent protection measures. If campaign finance legislation is operating to insulate incumbents against electoral challenge, there is a strong reason, on grounds of active liberty (among others), for courts to take a strong role.

¹⁰⁷. See *THE FEDERALIST* NO. 78 (Alexander Hamilton); see also 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that constitutional decisions represent the views of "We the People," and hence have a superior status to ordinary law).

¹⁰⁸. See *LEARNED HAND, THE SPIRIT OF LIBERTY* (Irving Dilliard ed., 1960).

deferential Court will ultimately produce exactly the right mix between the two kinds of freedom.

Of course, Ely's approach, emphasizing reinforcement of democratic processes, can easily be rooted in active liberty; indeed, active liberty lies at its heart. Breyer writes approvingly of the Warren Court on the ground that its decisions promoted active liberty,¹⁰⁹ and Ely is the Warren Court's most systematic defender. Does Breyer mean to endorse Ely? If not, where does he differ? A puzzling gap in Breyer's book is the omission of any treatment of Ely's apparently similar argument.¹¹⁰

Recall that Breyer candidly acknowledges that legislative purpose is not something that can simply be found. Purpose is what judges attribute to the legislature, based on their own conception of what reasonable legislators would mean to do. If this is true for the purposes of individual statutes, it is also true for the purposes of the Constitution. When Breyer says that a "basic" purpose of the Constitution is to protect active liberty, so as to produce concrete conclusions on disputed questions, his own judgments about the goals of a reasonable constitution-maker are playing a central role. Fortunately, Breyer's own judgments are indeed reasonable. But he underplays the extent to which they are his own.

The same point bears on Breyer's enthusiasm for an inquiry into consequences. Consequences certainly do matter, but much of the time it is impossible to assess consequences without reference to disputed questions of value. Return to the question of affirmative action, and suppose, rightly, that the text of the Constitution could, but need not, be understood to require color-blindness. If we care about consequences, will we accept the color-blindness principle or not? Suppose we believe that affirmative action programs create racial divisiveness and increase the risk that underqualified people will be placed in important positions, to the detriment of all concerned. If those are bad consequences, perhaps we will oppose affirmative action programs. An emphasis on consequences as such is only a start. Of course, Breyer is not concerned with consequences alone; he wants to understand them with close reference to specified purposes, above all active liberty. But as I have suggested, that idea, taken in the abstract, is compatible with a range of different approaches to constitutional law; it need not be taken to compel Breyer's own approach.

109. BREYER, *supra* note 15, at 11.

110. There is only one reference to Ely, presaged by a "cf." See BREYER, *supra* note 15, at 146 n.14. Note also that Frank Michelman has made closely related arguments. See Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

D. Theories and Judging

None of this means that Breyer is wrong. On the contrary, I believe that he is generally right. He is right to reject originalism. He is right to say that the free speech principle should be understood in democratic terms. He is right to say that when the Court lacks important information it should rule cautiously and narrowly. He is right to resist the constitutional assault on affirmative action programs (an assault that, by the way, is extremely hard to defend in originalist terms¹¹¹). He is right to embrace a form of minimalism, counseling narrow rulings on the hardest questions. Above all, he is right to emphasize the importance of democratic goals to constitutional interpretation. But to make his argument convincing, he would have to offer a more sustained encounter between his own approach and the imaginable alternatives.

Breyer would also have to do much more to show that his own approach imposes sufficient discipline on judicial judgments. Breyer does assert the presence of such discipline, pointing to "the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect."¹¹² This is too brisk. But it would certainly be possible for a judge concerned with active liberty and consequences to insist on stability in the law, on small rather than large steps, on avoiding disruption of established practices, and on a general presumption in favor of enacted law. No general approach can eliminate discretion from judicial decisions, but Breyer's position would be more appealing if it were developed with careful attention to the need for constraints. The most charitable, and in my view accurate, reading is that Breyer is sketching an approach to legal interpretation that will, in many cases, lead him to rule in ways that do not match his personal commitments.¹¹³

A deeper point lies in the background here. For the selection of a general theory of interpretation, a great deal turns on context. Breyer argues against originalism, and I agree with him; but it is possible to imagine a world in which originalism would make a great deal of sense. Suppose, for example, that the original public meaning of the founding document would generally or always produce sensible results; that violations of the original public meaning would be unjust or otherwise unacceptable; that democratic processes that did

111. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

112. BREYER, *supra* note 15, at 118-19.

113. Note in this regard that Justice Breyer has shown a high level of deference to the decisions of the executive branch under President George W. Bush—higher in fact than that of many Republican appointees; note too that in many of these cases, Justice Breyer has ruled in favor of conservative outcomes. See Sunstein, *supra* note 14.

not violate the original public meaning would not cause serious problems from the standpoint of justice or otherwise; and that judges, not following the original public meaning, would produce terrible blunders from the appropriate point of view. In such a world, originalism would be the best approach to follow. The larger point is that the Constitution itself does not contain a theory of interpretation, and no single theory would make sense in every imaginable world.

It is also possible to doubt whether the Supreme Court should accept any ambitious or unitary theory of interpretation.¹¹⁴ Perhaps the Court does best, in our actual world, if it avoids ambitious accounts (including Breyer's), and decides cases, if it can, with reference to reasons that can command agreement from those with diverse views about foundational questions, and from those who do not want to take a stand on those questions. Perhaps a commitment to active liberty is too contentious or too sectarian to command general assent. But at least this much can be said on Breyer's behalf: If an ambitious account is desirable, indispensable, or unavoidable, an emphasis on the commitment to democratic rule is hardly the worst place to start.

CONCLUSION

Within the Supreme Court itself, the most powerful recent theoretical arguments have come from Justice Scalia, with his insistence on originalism and his complaint that if courts are not bound by the original understanding they are essentially doing whatever they want.¹¹⁵ Breyer has now developed a distinctive argument of his own, one that demonstrates the possibility of a nonoriginalist method that, while not eliminating discretion, is hardly a blank check to the judiciary. Breyer's originality lies in his effort to forge links among its three disparate moving parts: an appreciation of active liberty and its place in our constitutional tradition; a commitment to purposive understandings of interpretation; and an insistence, inspired by American pragmatism, that theories of interpretation must be evaluated in terms of their consequences. The result is an approach that is respectful of democratic prerogatives and that makes an important place for narrow rulings in the most difficult domains.

I have emphasized what seems to me a central problem in Breyer's account: the difficulty of characterizing purposes, and of counting purposes as reasonable, without an evaluative judgment of the interpreter's own. In hard

114. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

115. See SCALIA, *supra* note 9, at 41-47.

cases, judgments about purpose are partly normative, not only descriptive.¹¹⁶ What is true for particular provisions is true for the founding document as a whole. Active liberty is certainly a theme of the document, but it is not easy to deduce from that theme particular conclusions about the legal issues raised by campaign finance restrictions, affirmative action plans, privacy, and judicial review of agency action. Nor does active liberty, standing alone, make the choice between textual and purposive approaches to constitutional interpretation. On purely pragmatic grounds, purposive approaches run into serious problems once we acknowledge the role of judicial discretion in the characterization of purposes. A commitment to active liberty is entirely compatible with a commitment to textualism.

I have also suggested the possibility of endorsing a kind of second-order pragmatism, one that attempts to develop tools to discipline the judicial inquiry into both consequences and purposes. Perhaps we are all pragmatists now, in the sense that we can agree that any theory of interpretation must pay close attention to the outcomes that it produces.¹¹⁷ Whether or not we do agree on that point, we certainly should. The problem is that many diverse views can march under the pragmatic banner. I have argued in particular for the centrality of text, accompanied by canons of construction to help with the most difficult cases.

But if Breyer's particular conclusions are not compelled by his general themes, they are always plausible, and usually more than that; and they are defended in a way that is appealingly generous and respectful of those who disagree. It is highly illuminating to see, from one of the Court's "liberals," a persistent plea for a degree of judicial modesty, a call for deference to the judgments of the elected branches, and an endorsement of rulings that are cautious and tentative. One of the largest virtues of his book is its convincing demonstration that those who reject Breyer's judgments are obliged to engage him in the terms that he has sketched—by showing how a proper respect for self-government, and careful attention to consequences, are compatible with competing judgments of their own.

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¹¹⁶ This point is emphasized and not deplored in DWORKIN, *supra* note 88. Insofar as he emphasizes the constructive element in interpretation, Dworkin seems to me to make a large advance on Hart and Sacks, whose approach resembles his.

¹¹⁷ See Scalia, *supra* note 9 (defending originalism in part by reference to consequentialist considerations). Note that even Dworkin describes himself as a consequentialist. See Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 364 (1997).

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